S. HRG. 98-385

COMPETITION IN CONTRACTING ACT OF 1983

HEARINGS

BEFORE THE

COMMITTEE ON ARMED SERVICES
UNITED STATES SENATE

NINETY-EIGHTH CONGRESS

FIRST SESSION

ON

S. 338

TO REVISE THE PROCEDURES FOR SOLICITING AND EVALUATING BIDS AND PROPOSALS FOR GOVERNMENT CONTRACTS AND AWARDING SUCH CONTRACTS, AND FOR OTHER PURPOSES

JUNE 7, 9, 1983

Printed for the use of the Committee on Armed Services

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CONTENTS

CHRONOLOGICAL LIST OF WITNESSES

JUNE 7, 1983

Page

Gilleece, Mary Ann, Deputy Under Secretary for Department of Defense for Acquisition Management, accompanied by Harvey Gordon, Assistant Deputy Under Secretary and Dennis Trosch, Assistant General Counsel for Logistics ... 47

Gilroy, Robert, Senior Associate Director of the National Security and International Affairs Division, General Accounting Office, accompanied by Sidney Wolin, National Security, International Affairs Division; and Seymour Efros, Associate General Counsel for Procurement Transportation Law ... 64

JUNE 9, 1983

Vander Schaaf, Derek J., Acting Deputy Inspector General, Department of Defense ... 282

Starrett, Charles O., Jr., Director, Defense Contract Audit Agency ... 292

Cibinic, Prof. John, Jr., Government Contracts Program, National Law Center, The George Washington University ... 301

Rosenzweig, Robert M., President, Association of American Universities ... 314

Hahn, Bruce, Manager of Government Affairs, National Tooling and Machining Association (NTMA), accompanied by Paul J. Seidman, Special Counsel to the Association ... 318

COMPETITION IN CONTRACTING ACT OF 1983

TUESDAY, JUNE 7, 1983

U.S. SENATE,
COMMITTEE ON ARMED SERVICES,
Washington, D.C.

The committee met in open session pursuant to notice, at 10 a.m., in room SD-124, Dirksen Senate Office Building, Senator John Tower (chairman) presiding.

Present: Senators Tower, Thurmond, Cohen, Stennis, Exon, Levin, and Bingaman.

Staff present: Alan R. Yuspeh, general counsel; Paul C. Besozzi, minority counsel; Brenda K. Hudson, assistant chief clerk; and Marie Chaillet, staff assistant.

Also present: John Campbell, assistant to Senator Warner; Ron Kelly, assistant to Senator Humphrey; Jim Dykstra, assistant to Senator Cohen; Hank Steenstra, assistant to Senator Quayle; Jeffrey Minsky and Susan Collins, assistants to Senator Cohen; Greg Pallas, assistant to Senator Exon; Ed McGaffigan, assistant to Senator Bingaman; and Ralph White, assistant to Senator Nunn.

[The bill S. 338 follows:]

98th CONGRESS
1st Session

S. 338

To revise the procedures for soliciting and evaluating bids and proposals for Government contracts and awarding such contracts, and for other purposes.

IN THE SENATE OF THE UNITED STATES

February 1 (legislative day, January 25), 1983

Mr. Cohen (for himself, Mr. Roth, Mr. Levin, Mr. Rudman, Mr. Percy, Mr. Durenberger, Mr. Stevens, Mr. Danforth, Mr. Pryor, Mr. Proxmire, Mr. Heinz, and Mr. Mitchell) introduced the following bill; which was read twice and referred to the Committee on Governmental Affairs

February 2 (legislative day, January 25), 1983

Ordered, that if and when reported, the bill be referred to the Committee on Armed Services for not to exceed sixty calendar days (excluding any period of seven or more calendar days that the Senate is not in session) to consider any provisions which amend title 10 of the United States Code. Ordered further, that if the bill is not reported within the sixty-day period the committee will be discharged, but in no event will the committee be discharged prior to June 15, 1983.

March 23 (legislative day, March 21), 1983

Reported by Mr. Cohen, with amendments

[Omit the part struck through and insert the part printed in italic]

Referred to the Committee on Armed Services pursuant to the order of February 2, 1983

May 12 (legislative day, May 9), 1983

Ordered, that the agreement of February 2, 1983, is modified to provide that in no event will the Committee on Armed Services be discharged prior to June 30, 1983

A BILL

To revise the procedures for soliciting and evaluating bids and proposals for Government contracts and awarding such contracts, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Competition in Contracting Act of 1983".

TITLE I—AMENDMENTS TO FEDERAL PROPERTY AND ADMINISTRATIVE SERVICES ACT OF 1949

COMPETITIVE AND NONCOMPETITIVE PROCEDURES

SEC. 101. (a) Title III of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 251 et seq.) is amended—

(1) by striking out section 303 (41 U.S.C. 253) and the heading of such section and inserting in lieu thereof the following:

"COMPETITION REQUIREMENTS

"SEC. 303. (a) Except as provided in subsection (e) or otherwise authorized by law, executive agencies shall use competitive procedures in making contracts for property and services. Executive agencies shall use advance procurement planning and market research and shall prepare specifications in such a manner as is necessary to obtain effective competition with due regard to the nature of the property or services to be acquired. Executive agencies shall use the competitive procedure or combination of competitive procedures that is best suited under the circumstances of the procurement action and shall specify its needs and solicit bids, proposals, or quotations in a manner designed to achieve effective competition for the contract.

"(b) An executive agency may award a contract under this title in the procurement of property or services in order to establish or maintain any alternative source or sources of supply of such property or services if the executive agency determines that to do so would (1) increase competition and would likely result in reduced overall costs for such procurement, or for any anticipated procurement, of such property or services, or (2) be in the interest of industrial mobilization in case of a national emergency.

"(c) Procurement regulations shall include special simplified procedures and forms for small purchases to facilitate making small purchases efficiently and economically.

"(d) For other than small purchases, an executive agency, when using competitive procedures—

"(1) shall solicit sealed bids when—

"(A) time permits the solicitation, submission, and evaluation of sealed bids;

"(B) the award will be made on the basis of price and other factors considered;

"(C) it is not necessary to conduct discussions with the responding sources about their bids; and

"(D) there is a reasonable expectation of receiving more than one sealed bid;

"(2) shall request competitive proposals when sealed bids are not required under clause (1) of this subsection.

"(e) An executive agency may use noncompetitive procedures only when—

"(1) the property and services needed by the Government are available from only one source and no other type of property or services will satisfy the needs of the executive agency;

"(2) the executive agency's need for the property or services is of such *unusual and compelling* urgency that the Government would be seriously injured by the delay involved in using competitive procedures;

"(3) it is necessary to award the contract to a particular source or sources in order to maintain an essential industrial capability in the United States or to achieve national industrial mobilization;

"(4) the terms of ~~any agreement with~~ *any international agreement or treaty between the United States Government and* a foreign government, or the directions of any foreign government reimbursing the executive agency for the cost of the procurement of the property or services for such government, have the effect of requiring the use of noncompetitive procedures;

"(5) a statute provides that the procurement be made through another executive agency or a specified source; or

"(6) the disclosure of the executive agency's needs to more than one source would compromise the national security.

"(f) An executive agency may not award a contract~~, for other than small purchases, using noncompetitive procedures unless a notice has been published pursuant to section 313(a)(1)(A).";~~ *using noncompetitive procedures unless—*

"(1) in the case of any contract other than a small purchase, a notice has been published with respect to such contract pursuant to section 313 and all bids, proposals, and quotations received in response to such notice have been considered by such executive agency; and

"(2) in the case of any contract exceeding $100,000, the use of such procedures is approved by the head of the organizational element of such executive agency which has the responsibility to enter into such

contract or by a designee of the head of such organizational element who is higher in such organizational element than the contracting officer issuing the solicitation with respect to such contract.";

(2) by adding at the end of section 309 (41 U.S.C. 259) the following new subsections:

"(b) The term 'executive agency' has the same meaning as provided in section 4(a) of the Office of Federal Procurement Policy Act (41 U.S.C. 403(a)), except that such term does not include the departments or establishments specified in section 2303(a) of title 10, United States Code.

"(c) The term 'competitive procedures' means procedures under which an executive agency enters into a contract after soliciting sealed bids or competitive proposals from more than one source that is capable of satisfying the needs of the executive agency.

"(d) The term 'noncompetitive procedures' means procedures other than competitive procedures.

"(e) The term 'small purchase' means any purchase or contract which does not exceed $25,000. A proposed procurement shall not be divided into several procurements primarily for the purpose of using the small purchase procedures."; and

(3) by adding at the end thereof the following new sections:

"SOLICITATION REQUIREMENTS

"SEC. 311. (a)(1) Each solicitation under this title shall include specifications which—

"(A) consistent with the needs of the executive agency, permit effective competition; and

"(B) include restrictive provisions or conditions only to the extent necessary to satisfy such needs or as authorized by law.

"(2) For the purposes of paragraph (1), the type of specification included in any solicitation shall depend on the nature of the needs of the executive agency and the market available to satisfy such needs. Subject to such needs, specifications may be stated in terms of—

"(A) function so that a variety of products or services may qualify;

"(B) performance, including specifications of the range of acceptable characteristics or of the minimum acceptable standards; or

"(C) design requirements.

"(b) Each solicitation for sealed bids or competitive proposals other than for small purchases shall include, in addition to the specifications described in subsection (a)—

"(1) a statement of—

"(A) all significant factors, including price, which the executive agency reasonably expects to consider in evaluating sealed bids or competitive proposals; and

"(B) the relative importance assigned to those factors;

"(2) in the case of sealed bids—

"(A) a statement that sealed bids will be evaluated without discussions with the bidders; and

"(B) the time and place for the opening of the sealed bids; and

"(3) in the case of competitive proposals—

"(A) a statement that the proposals are intended to be evaluated with, and awards made after, discussions with the offerors but might be evaluated and awarded without discussions with the offerors; and

"(B) the time and place for submission of proposals.

"EVALUATION AND AWARD

"SEC. 312. (a) An executive agency shall evaluate sealed bids and competitive proposals based on the factors specified in the solicitation.

"(b) All sealed bids or competitive proposals received in response to a solicitation may be rejected if the head of the executive agency determines that such action is in the public interest.

"(c) Sealed bids shall be opened publicly at the time and place stated in the solicitation. The executive agency shall evaluate the bids without discussions with the bidders and shall, except as provided in subsection (b), award a contract with reasonable promptness to the responsible bidder whose bid conforms to the solicitation and is most advantageous to the United States, considering the price and the other factors included in the solicitation under section 311(b)(1). The award of a contract shall be made by transmitting written notice of the award to the successful bidder.

"(d)(1) The executive agency shall evaluate competitive proposals and may award a contract—

"(A) after discussions conducted with the offerors at any time after receipt of the proposals and prior to the award of the contract; or

"(B) without discussions with the offerors beyond discussions conducted for the purpose of minor clarification.

"(2) In the case of award of a contract under paragraph (1)~~(a)~~ *(A)*, the executive agency shall conduct, before such award, written or oral discussions with all responsible offerors who submit proposals within a competitive range, price and other evaluation factors considered.

"(3) In the case of award of a contract under paragraph (1)(B), the executive agency shall award the contract based on the proposals as received (and as clarified, if necessary, in discussions conducted for the purpose of minor clarification).

"(4) The executive agency shall, except as otherwise provided in subsection (b), award a contract with reasonable promptness to the responsible offeror whose proposal is most advantageous to the United States, considering price and the other factors included in the solicitation under section 311(b)(1). The executive agency shall award the contract by transmitting written notice of the award to such offeror and shall promptly notify all other offerors of the rejection of their proposals.

"(e) If the head of an executive agency considers that any bid received under sealed bid procedures evidences a violation of the antitrust laws, he shall refer the bid to the Attorney General for appropriate action.

"PROCUREMENT NOTICE

"SEC. 313. (a)(1) Except as provided in subsection ~~(e) and subject to paragraph (2)—~~ *(c)*—

"(A) an executive agency intending to ~~enter into~~ *solicit bids, proposals, or quotations for* a contract for property or services at a price exceeding ~~the maximum amount established for small purchases in section 309(e)~~ *$10,000* shall furnish for publication by the Secretary of Commerce a notice described in subsection (b)~~(1)~~; and

"(B) an executive agency awarding a contract for property or services at a price exceeding ~~the maximum amount established for small purchases in section 309(c)~~ *$10,000* shall furnish for publication by the Secretary of Commerce a notice announcing such award *if there is likely to be any subcontract under such contract.*

~~"(2) The Administrator for Federal Procurement Policy may establish such minimum price as he considers appropriate for the purposes of paragraph (1) at an amount that is lower than the amount referred to in clause (A) or (B) of such paragraph.~~

"(2) The Secretary of Commerce shall publish promptly in the Commerce Business Daily each notice required by paragraph (1).

"(3) Whenever an executive agency is required by paragraph (1)(A) to furnish a notice of a solicitation to the Secretary of Commerce, such executive agency may not—

"(A) issue such solicitation earlier than fifteen days after the date on which such notice is published by the Secretary of Commerce; or

"(B) establish a deadline for the submission of bids, proposals, or quotations in response to such solici-

tation that is earlier than thirty days after the date on which such solicitation is issued.

"(b)~~(1)~~ Each notice required by subsection (a)(1)(A) shall *include—*

~~"(A) be published as early as practicable in the procurement process, but not less than thirty days before the date set for the receipt of bids or proposals; and~~

~~"(B) include—~~

~~"(i) a description of the property or services to be contracted for, which description is not unnecessarily restrictive of competition;~~

~~"(ii) the identity and location of the officer or employee of the executive agency who may be contacted for the purpose of obtaining a copy of the solicitation;~~

~~"(iii) a statement that any person may submit a bid, proposal, or quotation which shall be considered by the executive agency; and~~

~~"(iv) in the case of a procurement using noncompetitive procedures, a statement of the reason justifying the use of noncompetitive procedures and the identity of the intended source.~~

~~"(2) The Secretary of Commerce shall publish promptly each notice required by subsection (a)(1)(B) after the time of the award of the contract.~~

~~"(c) The requirements of subsection (a) do not apply to—~~

~~"(1) any classified procurement with respect to which a notice under such subsection cannot be written in a manner which avoids the disclosure of classified information; and~~

~~"(2) any procurement under conditions described in clauses (2), (3), (4), or (5) of section 303(c).~~

"(1) a description of the property or services to be contracted for, which description is not unnecessarily restrictive of competition;

"(2) the name and address of the officer or employee of the executive agency who may be contacted for the purpose of obtaining a copy of the solicitation;

"(3) a statement that any person may submit a bid, proposal, or quotation which shall be considered by the executive agency; and

"(4) in the case of a procurement using noncompetitive procedures, a statement of the reason justifying the use of noncompetitive procedures and the identity of the intended source.

"(c)(1) A notice is not required under subsection (a)(1) if the notice would disclose the executive agency's needs and the disclosure of such needs would compromise the national security.

"(2) The requirements of subsection (a)(1)(A) do not apply—

"(A) to any procurement under conditions described in clause (2), (3), (4), or (5) of section 303(e); and

"(B) in the case of any procurement for which the head of the executive agency carrying out such procurement makes a determination in writing, with the concurrence of the Administrator of the Small Business Administration, that it is not appropriate or reasonable to publish a notice before issuing a solicitation.

"RECORD REQUIREMENTS

"SEC. 314. (a) Each executive agency shall establish and maintain for a period of five years a record, by fiscal year, of the procurements, other than small purchases, in such fiscal year in which—

"(1) noncompetitive procedures were used; and

"(2) only one bid or proposal was received after competitive procedures were used.

"(b) The record established under subsection (a) shall include, with respect to each procurement—

"(1) information identifying the source to whom the contract was awarded;

"(2) the property or services obtained by the Government under the procurement;

"(3) the total cost of the procurement;

"(4) the reason under section 303(e) for the use of noncompetitive procedures; and

"(5) the position of the officers or employees of the executive agency who required and approved the use of noncompetitive procedures in such procurement.

"(c) The information included in the record established and maintained under subsection (a) shall be transmitted to the Federal Procurement Data Center referred to in section 6(d)(5) of the Office of Federal Procurement Policy Act (41 U.S.C. 405(d)(5)).".

(b) The table of contents of such Act is amended—

(1) by striking out the item relating to section 303 and inserting in lieu thereof the following:

"Sec. 303. Competition requirements.";

and

(2) by inserting after the item relating to section 310 the following new items:

"Sec. 311. Solicitation requirements.
"Sec. 312. Evaluation of bids; awards.
"Sec. 313. Procurement notice.
"Sec. 314. Record requirements.".

COST AND PRICING DATA

SEC. 102. Section 304 of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 254) is amended by adding at the end thereof the following new subsection:

"(d)(1) A prime contractor or any subcontractor shall be required to submit cost or pricing data under the circumstances listed below, and shall be required to certify that, to the best of his knowledge and belief, the cost or pricing data he submitted was accurate, complete, and current—

"(A) prior to the award of any prime contract under this title using other than sealed bid procedures where the price is expected to exceed ~~$500,000~~ *$100,000*;

"(B) prior to the pricing of any contract change or modification for which the price adjustment is expected to exceed ~~$500,000~~ *$100,000*, or such lesser amount as may be prescribed by the head of the agency;

"(C) prior to the award of a subcontract at any tier, where the prime contractor and each higher tier subcontractor have been required to furnish such a certificate, if the price of such subcontract is expected to exceed ~~$500,000~~ *$100,000*; or

"(D) prior to the pricing of any contract change or modification to a subcontract covered by clause (C), for which the price adjustment is expected to exceed

~~$500,000~~ *$100,000*, or such lesser amount as may be prescribed by the head of the agency.

"(2) Any prime contract or change or modification thereto under which a certificate is required under paragraph (1) shall contain a provision that the price to the Government, including profit or fee, shall be adjusted to exclude any significant sums by which it may be determined by the executive agency that such price was increased because the contractor or any subcontractor required to furnish such a certificate, furnished cost or pricing data which, as of a date agreed upon between the parties (which date shall be as close to the date of agreement on the price as is practicable), was inaccurate, incomplete, or noncurrent.

"(3) For the purpose of evaluating the accuracy, completeness, and currency of cost or pricing data required to be submitted by this subsection, any authorized representative of the head of the agency who is an employee of the United States Government shall have the right, until the expiration of three years after final payment under the contract or subcontract, to examine all books, records, documents, and other data of the contractor or subcontractor related to the proposal for the contract, the discussions conducted on the proposal under this chapter, pricing, or performance of the contract or subcontract.

"(4) The requirements of this subsection need not be applied to contracts or subcontracts where the price is based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, prices set by law or regulation or, in exceptional cases where the head of the executive agency determines that the requirements of this subsection may be waived and states in writing his reasons for such determination.".

CONFORMING AMENDMENTS

SEC. 103. (a) Title III of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 251 et seq.) is amended—

(1) in section 302 (41 U.S.C. 252)—

(A) by striking out the second sentence in subsection (b);

(B) by striking out subsections (c) and (d); and

(C) by redesignating subsections (e) and (f) as subsections (c) and (d), respectively;

(2) by striking out the heading of section 304 and inserting in lieu thereof the following:

"CONTRACT REQUIREMENTS";

(3) in section 304 (41 U.S.C. 254)—

(A) by striking out "negotiated pursuant to section 302(c)" in the first sentence of subsection (a) and inserting in lieu thereof "awarded using other than sealed bid procedures";

(B) by striking out "negotiated pursuant to section 302(c)" in the second sentence of subsection (a) and inserting in lieu thereof "awarded after using other than sealed bid procedures"; and

(C) by striking out "negotiated without advertising pursuant to authority contained in this Act" in the first sentence of subsection (c) and inserting in lieu thereof "awarded after using other than sealed bid procedures";

(4) in section 307 (41 U.S.C. 257)—

(A) by striking out "Except as provided in subsection (b), and except" in the second sentence of subsection (a) and inserting in lieu thereof "Except";

(B) by striking out subsection (b);

(C) by striking out "by paragraphs (11)–(13), or (14) of section 302(c)," in subsection (c);

(D) by redesignating subsection (c) as subsection (b); and

(E) by striking out subsection (d);

(5) by striking out "entered into pursuant to section 302(c) without advertising," in section 308 and inserting in lieu thereof "made or awarded after using other than sealed bid procedures"; and

(6) by striking out "section 302(c)(15) of this title without regard to the advertising requirements of sections 302(c) and 303." in section 310 and inserting in lieu thereof "the provisions of this title relating to other than sealed bid procedures.".

(b) The table of contents of such Act is amended by striking out the item relating to section 304 and inserting in lieu thereof the following:

"Sec. 304. Contract requirements.".

TITLE II—AMENDMENTS TO TITLE 10, UNITED STATES CODE

COMPETITIVE AND NONCOMPETITIVE PROCEDURES

SEC. 201. (a) Chapter 137 of title 10, United States Code, is amended—

(1) in section 2302—

(A) by inserting "the Secretary, any Deputy Secretary, any Under Secretary, or any Assistant Secretary of Defense;" after "means" in clause (1);

(B) by striking out clauses (2) and (3) of section 2302 and inserting in lieu thereof the following:

"(2) 'Agency' means any department or establishment specified in section 2303(a) of this title.

"(3) 'Competitive procedures' means procedures under which the head of an agency enters into a contract after soliciting sealed bids or competitive proposals from more than one source that is capable of satisfying the needs of the agency.

"(4) 'Noncompetitive procedures' means procedures other than competitive procedures.

"(5) 'Small purchase' means any purchase or contract which does not exceed $25,000. A proposed procurement shall not be divided into several procurements primarily for the purpose of using small purchase procedures.";

(2) in section 2303(a)—

(A) by redesignating clauses (1), (2), (3), (4), and (5) as clauses (2), (3), (4), (5), and (6), respectively; and

(B) by inserting before clause (2) (as redesignated by subclause (A)) the following:

"(1) The Department of Defense.";

(3) by striking out sections 2304 and 2305 and inserting in lieu thereof the following:

"§ 2304. Competition requirements

"(a) Except as provided in subsection (e) of this section or otherwise authorized by law, the head of an agency shall use competitive procedures in making contracts for property and services. The head of an agency shall use advance procurement planning and market research and shall prepare specifications in such a manner as is necessary to obtain effective competition with due regard to the nature of the property or services to be acquired. The head of an agency shall use the competitive procedure or combination of competitive procedures that is best suited under the circumstances of the procurement action and shall specify the needs of the agency and solicit bids, proposals, or quotations in a manner designed to achieve effective competition for the contract.

"(b) The head of an agency may award a contract under this title in the procurement of property or services in order to establish or maintain any alternative source or sources of supply of such property or services if such head of an agency determines that to do so would (1) increase competition and would likely result in reduced overall costs for such procurement, or for any anticipated procurement, of property or services, or (2) be in the interest of industrial mobilization in case of a national emergency.

"(c) Procurement regulations shall include special simplified procedures and forms for small purchases to facilitate making small purchases efficiently and economically.

"(d) For other than small purchases, the head of an agency, when using competitive procedures—

"(1) shall solicit sealed bids when—

"(A) time permits the solicitation, submission, and evaluation of sealed bids;

"(B) the award will be made on the basis of price and other factors considered;

"(C) it is not necessary to conduct discussions with the responding sources about their bids; and

"(D) there is reasonable expectation of receiving more than one sealed bid;

"(2) shall request competitive proposals from responding sources when sealed bids are not required under clause (1) of this subsection.

"(e) The head of an agency may use noncompetitive procedures only when—

"(1) the property and services needed by the Government are available from only one source and no other type of property or services will satisfy the needs of the agency;

"(2) the agency's need for the property or services is of such *unusual and compelling* urgency that the Government would be seriously injured by the delay involved in using competitive procedures;

"(3) it is necessary to award the contract to a particular source or sources in order to maintain an essential industrial capability in the United States or to achieve national industrial mobilization;

"(4) the terms of ~~any agreement with~~ *any international agreement or treaty between the United States Government and* a foreign government, or the directions of any foreign government reimbursing the agency for the cost of the procurement of the property or services for such government, have the effect of requiring the use of noncompetitive procedures;

"(5) a statute provides that the procurement be made through another agency or a specified source; or

"(6) the disclosure of the agency's needs to more than one source would compromise the national security.

"(f) The head of an agency may not award a contract~~, for other than small purchases, using noncompetitive procedures unless a notice has been published pursuant to section 2305(c)(1)(A)(i) of this title.~~ *using noncompetitive procedures unless—*

"(1) in the case of any contract other than a small purchase, a notice has been published with respect to such contract pursuant to section 2305 (c) of this title and all bids, proposals, and quotations re-

ceived in response to such notice have been considered by such head of an agency; and

"(2) in the case of any contract exceeding $100,000, the use of such procedures is approved by the head of the organizational element of such agency which has the responsibility to enter into such contract or by a designee of the head of such organizational element who is higher in such organizational element than the contracting officer issuing the solicitation with respect to such contract.

"§ 2305. Solicitation, evaluation, and award procedures; notice requirements

"(a)(1)(A) Each solicitation under this title shall include specifications which—

"(i) consistent with the needs of the agency, permit effective competition; and

"(ii) include restrictive provisions or conditions only to the extent necessary to satisfy such needs or as authorized by law.

"(B) For the purposes of subparagraph (A) of this paragraph, the type of specification included in any solicitation shall depend on the nature of the needs of the agency and the market available to satisfy such needs. Subject to such needs, specifications may be stated in terms of—

"(i) function so that a variety of products or services may qualify;

"(ii) performance, including specifications of the range of acceptable characteristics or of the minimum acceptable standards; or

"(iii) design requirements.

"(2) Each solicitation for sealed bids or competitive proposals other than for small purchases shall include, in addition to the specifications described in paragraph (1) of this subsection—

"(A) a statement of—

"(i) all significant factors, including price, which the executive agency reasonably expects to consider in evaluating sealed bids or competitive proposals; and

"(ii) the relative importance assigned to those factors;

"(B) in the case of sealed bids—

"(i) a statement that sealed bids will be evaluated without discussions with the bidders; and

"(ii) the time and place for the opening of the sealed bids; and

"(C) in the case of competitive proposals—

"(i) a statement that the proposals are intended to be evaluated with, and awards made after, discussions with the offerors but might be evaluated and awarded without discussions with the offerors; and

"(ii) the time and place for submission of proposals.

"(b)(1) The head of an agency shall evaluate sealed bids and competitive proposals based on the factors specified in the solicitation.

"(2) All sealed bids or competitive proposals received in response to a solicitation may be rejected if the head of an agency determines that such action is in the public interest.

"(3) Sealed bids shall be opened publicly at the time and place stated in the solicitation. The head of an agency shall evaluate the bids without discussions with the bidders and shall, except as provided in paragraph (2) of this subsection, award a contract with reasonable promptness to the responsible bidder whose bid conforms to the solicitation and is most advantageous to the United States, considering the price and the other factors included in the solicitation under subsection (a)(2)(A) of this section. The award of a contract shall be made by transmitting written notice of the award to the successful bidder.

"(4)(A) The head of an agency shall evaluate competitive proposals and may award a contract—

"(i) after discussions conducted with the offerors at any time after receipt of the proposals and prior to the award of the contract; or

"(ii) without discussions with the offerors beyond discussions conducted for the purpose of minor clarification.

"(B) In the case of award of a contract under subparagraph (A)(i) of this paragraph, the head of an agency shall conduct, before such award, written or oral discussions with all responsible offerors who submit proposals within a competitive range, price and other evaluation factors considered.

"(C) In the case of award of a contract under subparagraph (A)(ii) of this paragraph, the head of an agency shall award the contract based on the proposals received (and as clarified, if necessary, in discussions conducted for the purpose of minor clarification).

"(D) The head of an agency shall, except as provided in paragraph (2) of this subsection, award a contract with reasonable promptness to the responsible offeror whose proposal is most advantageous to the United States, considering price and other factors included in the solicitation under subsection (a)(2)(A) of this section. The head of the agency shall award the contract by transmitting written notice of the award to such offeror and shall promptly notify all other offerors of the rejection of their proposals.

"(5) If the head of an agency considers that any bid received under sealed bid procedures evidences a violation of the antitrust laws, he shall refer the bid to the Attorney General for appropriate action.

"(c)(1)(A) Except as provided in paragraph (3) of this ~~subsection and subject to subparagraph (B) of this paragraph—~~*subsection*—

"(i) a head of an agency intending to ~~enter into~~ *solicit bids, proposals, or quotations for* a contract for property or services at a price exceeding ~~the maximum amount established for small purchases in section 2302(5) of this title~~ *$10,000* shall furnish for publication by the Secretary of Commerce a notice described in paragraph (2)~~(A)~~ of this subsection; and

"(ii) a head of an agency awarding a contract for property or services at a price exceeding ~~the maximum amount established for small purchases in section 2302(5) of this title~~ *$10,000* shall furnish for publication by the Secretary of Commerce a notice announcing such award *if there is likely to be any subcontract under such contract.*

~~"(B) The Administrator for Federal Procurement Policy may establish such minimum price as he considers appropriate for the purposes of subparagraph (A) of this paragraph at~~

~~an amount that is lower than the amount referred to in clause (i) or (ii) of such subparagraph.~~

"(B) The Secretary of Commerce shall publish promptly in the Commerce Business Daily each notice required by subparagraph (A) of this paragraph.

"(C) Whenever a head of an agency is required by subparagraph (A)(i) of this paragraph to furnish a notice of a solicitation to the Secretary of Commerce, such head of an agency may not—

"(i) issue such solicitation earlier than fifteen days after the date on which such notice is published by the Secretary of Commerce; or

"(ii) establish a deadline for the submission of bids, proposals, or quotations in response to such solicitation that is earlier than thirty days after the date on which such solicitation is issued.

"(2)~~(A)~~ Each notice required by paragraph (1)(A)(i) of this subsection shall *include*—

~~"(i) be published as early as practicable in the procurement process, but not less than thirty days before the date set for the receipt of bids or proposals; and~~

~~"(ii) include a description of the property or services to be contracted for (which description is not unnecessarily restrictive of competition), the identity and~~

~~location of the officer or employee of the agency who may be contacted for the purpose of obtaining a copy of the solicitation, a statement that any person may submit a bid, proposal, or quotation which shall be considered by the head of an agency, and in the case of a procurement using noncompetitive procedures, a statement of the reason justifying the use of noncompetitive procedures and the identity of the intended source.~~

~~"(B) The Secretary of Commerce shall publish promptly each notice required by paragraph (1)(A)(ii) of this subsection after the time of the award of the contract.~~

~~"(3) The requirements of paragraph (1) of this subsection do not apply to—~~

~~"(A) any classified procurement with respect to which a notice under such paragraph cannot be written in a manner which avoids the disclosure of classified information; and~~

~~"(B) any procurement under conditions described in clause (2), (3), (4), or (5) of section 2304(c).";~~ and

"(A) a description of the property or services to be contracted for, which description is not unnecessarily restrictive of competition;

"(B) the name and address of the officer or employee of the agency who may be contacted for the purpose of obtaining a copy of the solicitation;

"(C) a statement that any person may submit a bid, proposal, or quotation which shall be considered by the agency; and

"(D) in the case of a procurement using noncompetitive procedures, a statement of the reason justifying the use of noncompetitive procedures and the identity of the intended source.

"(3)(A) A notice is not required under paragraph (1)(A) of this subsection if the notice would disclose the agency's needs and the disclosure of such needs would compromise the national security.

"(B) The requirements of paragraph (1)(A)(i) of this subsection do not apply—

"(i) to any procurement under conditions described in clause (2), (3), (4), or (5) of section 2304(e) of this title; and

"(ii) in the case of any procurement for which the head of the agency carrying out such procurement makes a determination in writing, with the concurrence of the Administrator of the Small Business Administration, that it is not appropriate or reasonable to publish a notice before issuing a solicitation."; and

(4) by adding at the end thereof the following new section:

"§ 2316. Record requirements

"(a) Each head of an agency shall establish and maintain for a period of five years a record, by fiscal year, of the procurements, other than small purchases, in such fiscal year in which—

"(1) noncompetitive procedures were used; and

"(2) only one bid or proposal was received after competitive procedures were used.

"(b) The record established under subsection (a) of this section shall include, with respect to each procurement—

"(1) information identifying the source to whom the contract was awarded;

"(2) the property or services obtained by the Government under the procurement;

"(3) the total cost of the procurement;

"(4) the reason under section 2304(e) of this title for the use of noncompetitive procedures; and

"(5) the position of the officers or employees of the agency who required and approved the use of noncompetitive procedures in such procurement.

"(c) The information included in the record established and maintained under subsection (a) shall be transmitted to the Federal Procurement Data Center referred to in section 6(d)(5) of the Office of Federal Procurement Policy Act (41 U.S.C. 405(d)(5)).".

(b) The table of sections at the beginning of such chapter is amended—

(1) by striking out the items relating to sections 2304 and 2305 and inserting in lieu thereof the following:

"2304. Competition requirements.
"2305. Solicitation, evaluation, and award procedures; notice requirements.";

and

(2) by adding at the end thereof the following new item:

"2316. Record requirements.".

CONFORMING AMENDMENTS

SEC. 202. Chapter 137 of title 10, United States Code, is amended—

(1) in section 2306—

(A) by striking out "may, in negotiating contracts under section 2304," in the second sentence of subsection (a) and inserting in lieu thereof "may in awarding contracts after using other than sealed bid procedures";

(B) by striking out "negotiated under section 2304" in the first sentence of subsection (b) and inserting in lieu thereof "awarded after using other than sealed bid procedures";

(C) by striking out "section 2304 of this title," in subsection (c) and inserting in lieu thereof "this chapter";

(D) in subsection (f)(1)—

(i) by striking out clause (A) and inserting in lieu thereof the following:

"(1) prior to the award of any prime contract under this title after using other than sealed bid procedures where the price is expected to exceed ~~$500,000~~ *$100,000;*";

(ii) by striking out "negotiated" each place it appears in the second paragraph; ~~and~~

(iii) by striking out "negotiation," in the third paragraph and inserting in lieu thereof "proposal for the contract, the discussions conducted on the proposal under this title,"; and

(iv) by striking out "$500,000" each place it appears in clauses (B), (C), and (D) and inserting in lieu thereof "$100,000; and

(E) by adding at the end thereof the following new subsection:

"(i) Except in a case in which the Secretary of Defense determines that military requirements necessitate the specification of container sizes, no contract for the carriage of Government property in other than Government-owned cargo containers shall require carriage of such property in cargo containers of any stated length, height, or width.";

(2) by striking out subsection (b) of section 2310 and inserting in lieu thereof the following:

"(b) Each determination or decision under section 2306(c), section 2306(g)(1), section 2307(c), or section 2313(c) of this title shall be based on a written finding by the person making the determination or decision, which finding shall set out facts and circumstances that (1) clearly indicate why the type of contract selected under section 2306(c) is likely to be less costly than any other type or that it is impracticable to obtain property or services of the kind or quality required except under such a contract, (2) support the findings required by section 2306(g)(1), (3) clearly indicate why advance payments under section 2307(c) would be in the public interest, or (4) clearly indicate why the application of section 2313(b) to a contract or subcontract with a foreign contractor or foreign subcontractor would not be in the public interest. Such a finding is final and shall be kept available in the agency for at least six years after the date of the determination or decision. A copy of the finding shall be submitted to the General Accounting Office with each contract to which it applies.";

(3) by striking out section 2311 and inserting in lieu thereof the following: "The head of an agency may delegate, subject to his direction, to any other officer or official of that agency, any power under this chapter."; and

(4) by striking out "negotiated" in the second sentence of section 2313(b) and inserting in lieu thereof "awarded after using other than sealed bid procedures".

TITLE III—ADVOCATE FOR COMPETITION; ANNUAL REPORT ON COMPETITION

DEFINITION

SEC. 301. For the purposes of this title, the term "executive agency" has the same meaning as provided in section 4(a) of the Office of Federal Procurement Policy Act (41 U.S.C. 403(a)).

ADVOCATE FOR COMPETITION

SEC. 302. (a)(1) There is established in each executive agency an advocate for competition.

(2) Each head of an executive agency shall—

(A) designate for each executive agency one officer or employee serving in a position authorized for such executive agency on the date of enactment of this Act to serve as the advocate for competition;

(B) relieve such officer or employee of all duties and responsibilities that are inconsistent with the duties and responsibilities of the advocate for competition; and

(C) provide such officer or employee with such staff or assistance as may be necessary to carry out the duties and responsibilities of the advocate for competition.

(b)(1) The advocate for competition shall promote competition in the procurement of property and services.

(2) The advocate for competition in an executive agency shall—

(A) review the purchasing and contracting activities of the executive agency;

(B) identify and report to the head of the executive agency—

(i) opportunities to achieve competition on the basis of price and other significant factors in the purchases and contracts of the executive agency;

(ii) solicitations and proposed solicitations which include unnecessarily detailed specifications or unnecessarily restrictive statements of need which may reduce competition in the procurement activities of the executive agency; and

(iii) any other condition or action which has the effect of unnecessarily restricting competition in the procurement actions of the executive agency; and

(C) prepare and transmit to the head of the executive agency an annual report describing his activities under this section.

ANNUAL REPORT

SEC. 303. (a) Not later than September 30 of each of 1983, 1984, 1985, and 1986, each head of an executive agency shall transmit to the Committee on Governmental Affairs of the Senate and the Committee on Government Operations of the House of Representatives an annual report including the information specified in subsection (b).

(b) Each report transmitted under subsection (a) shall include—

(1) a specific description of all actions that the head of the executive agency intends to take during the next fiscal year to—

(A) increase competition for contracts with the executive agency on the basis of price and other significant factors; and

(B) reduce the number and dollar value of contracts entered into by the executive agency after soliciting bids or proposals from, or evaluating bids or proposals with discussions with, only one source; and

(2) a summary of the activities and accomplishments of the advocates for competition of the executive agency during the fiscal year in which the report is transmitted.

~~TITLE IV—NOTICE REQUIREMENTS UNDER THE SMALL BUSINESS ACT~~

~~Sec. 401. Section 8(e) of the Small Business Act (72 Stat. 389; 15 U.S.C. 637(e)) is repealed.~~

TITLE ~~V~~ *IV*—APPLICABILITY

Sec. ~~501.~~ *401.* The amendments made by this Act shall apply with respect to any solicitations for bids or proposals issued on or after the date one hundred and eighty days after the date of the enactment of this Act.

OPENING STATEMENT BY SENATOR JOHN TOWER, CHAIRMAN

Chairman TOWER. The committee will come to order.

Today the committee convenes to consider legislation that has been proposed for increased competition in contracting at the Department of Defense.

Senators Cohen and Levin, who are distinguished members of this committee, have authored legislation that is intended to increase the amount of competition in contracting throughout the Federal Government. They are joined in this effort by a number of other Senators, including the chairman of the Committee on Governmental Affairs, Senator Roth.

The legislation has been submitted in the 98th Congress as S. 338.

S. 338 has been favorably reported by the Committee on Governmental Affairs, which had original jurisdiction over the legislation since it deals with contracting in all governmental departments. The bill has been sequentially referred to the Committee on Armed Services for the purpose of this committee's evaluation of proposed amendments in the bill to title 10 of the United States Code, the Armed Services Procurement Act.

This committee properly has legislative jurisdiction over amendments to that law. The sequential referral to this committee expires on June 30, and it is my intention to schedule a mark-up on this bill so that we may report prior to that date.

I want to strongly commend Senators Cohen and Levin for this legislative initiative. Competition is at the very heart of our American economic system. In many ways, it is to economic freedom what free expression is to political freedom. Our economy was built on competition.

Our economic system presumes that anyone will have the opportunity to compete in the marketplace, and that consumers will obtain the best products at the fairest price as a result of such competition. The Federal Government certainly deserves nothing less.

Therefore, I think that the Senators from Maine and Michigan have performed a great service to the Senate by investigating the problem of competition in Government contracting at length, and by formulating legislation that is intended to increase the amount of competitive contracting that the Federal Government does.

We all recognize that there are special acquisition problems with the procurement of complex weapons systems. Often the Department of Defense is purchasing an aircraft, ship, or missile that only one or a few American companies is capable of manufacturing. Once the design of the weapons systems is complete and production has started, it is often uneconomical to have further competition because of the high cost of tooling a second manufacturer.

But the special problems of weapons system acquisition are no excuse for a failure by the Defense Department to compete every type of contract where competition is achievable. Much that DOD buys is commercially available and subject to competition.

In addition, many of the items procured by prime contractors are available from multiple sources, and there ought to be competition for these items in order to make certain that the American taxpayer is getting the best price.

I should also make clear this morning that while competition in contracting is very important, it is certainly not the only acquisition process issue of importance. There are a number of other concerns which this committee has about the DOD procurement process.

We are concerned about whether contracts provide sufficient incentive for manufacturers to reduce costs. We are concerned about the apparent extraordinary growth in the price of certain aircraft spare parts. And we are concerned about the methods used by the Department to audit contracts and to determine which costs of contractors the Government will pay.

In general, this committee recognizes that nothing compromises national confidence in its military capability more than the perception that defense procurement procedures are inefficient or wasteful.

It is my intention to devote additional committee time after S. 338 is reported to further hearings on other defense acquisition problems. I hope that the full range of procurement issues can be explored in these hearings. If the hearings reveal that further legislation is necessary to correct procurement procedures at DOD, I will ask the committee to give such legislation careful attention.

This morning we will hear from two Government witnesses on S. 338—the Department of Defense and the General Accounting Office. Several outside witnesses will appear before the committee at a later date.

At this time let me yield to Senator Stennis for any statement he may have to make.

Senator STENNIS. Mr. Chairman, thank you very much.

I am interested in this hearing. This legislation is very timely. You have made an excellent statement.

Chairman TOWER. I would now like to call on Senator Cohen who is the coauthor of this legislation for any comments he wishes to make.

Senator COHEN. Thank you, Mr. Chairman, for scheduling these hearings on S. 338, which Senator Levin and I introduced in the Senate and was referred initially, as you mentioned, to the Governmental Affairs Committee.

As you have noted, S. 338 was unanimously reported by the Governmental Affairs Committee on March 17, 1983. Senators Levin, Roth, Rudman, Percy, Danforth, Stevens, Durenberger, Heinz, Pryor, Proxmire, Mitchell and Riegle are all cosponsors.

I would like to take a few moments to go through a somewhat lengthy statement so that we can set the record rather straight, as far as I am concerned, about an issue which affects more than $150 billion of the Federal budget.

I would like to take a few moments to go back and review the history perhaps and make some observations.

Competitive procurement, whether formally advertised or competitively negotiated, is beneficial to the Government. The Competition in Contracting Act recognizes that competitive contracting takes more than one form and establishes an absolute preference for competition in the Federal procurement statutes. The legislation safeguards against unnecessary sole-source contracting by providing limited conditions under which agencies are permitted to contract noncompetitively and by requiring agencies to publicize prospective contracts to flush the marketplace for potential competitors.

As a final check on noncompetitive contracting, the bill establishes an advocate for competition and strengthens the recording and reporting requirements.

I might point out that these procurement reform proposals are not new. In fact, the Armed Services Committee held hearings in 1959 on legislation to provide competitive negotiations equal status with formal advertising. The Commission on Government Procurement made similar recommendations to improve the procurement process in its 1972 report to Congress. Most recently, the Office of Federal Procurement Policy adopted the Commission's recommendations in its 1982 proposal for a Uniform Federal Procurement System, which served as the basis for S. 338.

Despite this apparent consensus over the past quarter century that procurement reform is needed, and despite the fact that the dollar value of Government contracts has almost tripled during the past decade alone—from $57.5 billion in 1972 to $158.9 billion in 1982—the law which has governed military contracting since 1947 remains intact.

No one said procurement reform was going to be easy. One procurement expert recently likened it to Sisyphus rolling the stone uphill. The chairman knows the reference to Sisyphus, his frustration each time the rock rolls down. Although Sisyphus is depicted as a tragic figure in classical literature, we should also consider Camus' perspective that "the struggle to reach the top is itself enough to fulfill the heart of a man; one must believe that Sisyphus is happy."

I cannot help but think, however, how much happier Sisyphus would have been if he actually had achieved his goal and how much happier I will be if S. 338 finally becomes law.

Under our current contracting laws, Government agencies are required to promote the use of full and free competition in the procurement of property and services. In Government contracting, competition is a marketplace condition which results when several contractors, acting independently of each other and of the Government, submit bids or proposals in an attempt to secure the Government's business.

Currently, formal advertising is the preferred procurement procedure, with negotiation authorized by prescribed exceptions. Despite this preference for competition through formal advertising, however, negotiated contracts account for the vast majority of Government procurement dollars.

Negotiated contracts can be competitive—and the legislation recognizes and encourages competitive negotiation when it is the appropriate contracting method—but more than half of all negotiated contracts are sole sourced. The Defense Department awarded 53 percent of its contracts noncompetitively in fiscal 1982.

While not all Government contracts can be awarded competitively, too often agencies contract on a sole-source basis when competition is available. A July 1981 General Accounting Office [GAO] report, entitled "DOD Loses Many Competitive Procurement Opportunities," estimated that the Defense Department failed to obtain competition in awarding $289 million in new fiscal 1979 contract awards surveyed.

The benefits lost from awarding sole-source contracts which could have been competed are numerous.

First, competition in contracting saves money. Studies have indicated that between 15 and 50 percent can be saved through increased competition. In 1977, the Defense Science Board [DSB] examined more than a dozen examples of competed contracts for weapons and found significant evidence of cost savings, with an average savings of nearly 15 percent. The DSB concluded that "competition is a powerful motivator for cost control." More recently, the GAO reported, at Senator Levin's request, the results of the competitive procurement for the T–3 tractor—a contract which initially was to have been awarded noncompetitively. The GAO found that the lowest bid in a competitive procurement for the T–3 tractor was 43 percent less than the cost of the contract had it been awarded on a sole-source basis.

In March 1983, the Congressional Budget Office estimated that significant savings could be achieved through the effective implementation of the Competition in Contracting Act. The CBO estimates that each 1 percent saved on new contract actions reduces costs by about $200 million per year. Since studies on the use of competitive contracting have concluded that potential savings range from 15 to 50 percent, a conservative estimate of the savings resulting from this legislation would be well over $2 billion.

In addition to potential cost savings, competition curbs cost growth. The Analytic Sciences Corporation [TASC] completed a study in April 1982 which compared cost growth between competitive and noncompetitive programs. The TASC study found that cost growth in programs during full-scale development varied from 2 percent for competitive programs to 40.2 percent for noncompetitive programs, while cost growth during production ranged from 9.65 to 12.7 percent.

The last, and possibly the most important, benefit of competition is its inherent appeal of fair play. Competition maintains the integrity in the expenditure of public funds by insuring that Government contracts are awarded on the basis of merit rather than favoritism.

I believe there are two primary shortcomings in the present procurement statutes:

First, they do not recognize negotiation as a legitimate competitive procurement procedure; and second, they do not adequately restrict the use of noncompetitive negotiation.

Effective implementation of S. 338 would rectify both problems.

The formal advertising requirement in present law is intended to keep the system honest and to secure the most advantageous contract for the Government. The emphasis on formal advertising, however, results in excessive justification requirements for the use of negotiation, which is more appropriate for complex procurements.

If contracting officers need to consider factors other than price in making awards, or wish to have any discussions with prospective contractors, they must satisfy one of the statutory exceptions that permit negotiation. For all practical purposes, therefore, competitive negotiation lacks recognition as a bona fide competitive technique.

Our legislation removes the restriction from—and the written justification required for—competitive negotiation and places it on par with formal advertising. Together, they constitute competitive procedures, with exceptions provided for noncompetitive procedures.

The objective is to establish an absolute preference for competition and to provide more flexibility in contracting. William Long, former Deputy Under Secretary for DOD Acquisition Management, testified last year at a Governmental Affairs hearing that this new approach to competitive procurement best represents the real procurement world.

Under the Competition in Contracting Act, agencies are not only required to obtain competition, but to increase its effectiveness. Agencies would be required to obtain effective competition through advance procurement planning, market research, and the development of specifications which are not restrictive of competition.

We recognize that this extensive an effort may not be cost effective for small purchases. Therefore, this legislation provides a basis in statute for regulations to establish separate small purchase procedures for procurements under $25,000, which would allow agencies to scale down their efforts as long as they obtained reasonable competition.

The procurement statutes authorize negotiated procurement, but restrict its use to 17 conditions for defense contracts and 15 conditions for civilian contracts. While agencies are required to award negotiated contracts competitively to the maximum extent practicable, negotiation can be—and frequently is—noncompetitive.

The exception that is most frequently invoked is that "competition is impracticable" exception. S. 338 does not seek to be so restrictive that we undermine the basis for sound procurement practices. There are six basic exemptions that have been included under which we can justify noncompetitive procurements.

One, the property or service is available from only a single source and no competitive alternatives are available. You will be allowed to have noncompetitive negotiations in those situations.

Two, the Agency's need is of such unusual and compelling urgency that the Government would be seriously injured by the delay involved in using competitive procedures.

Three, the Government needs to award the contract to a particular source in order to create or maintain an essential industrial capability or for purposes of industrial mobilization.

Four, the terms of an international agreement have the effect of requiring the use of noncompetitive procedures.

Five, a statute provides that the procurement may be obtained through a specified source.

Six, disclosure to more than one source of the property or service to be obtained would jeopardize the national security.

These six exceptions parallel the conditions under which the Comptroller General has historically permitted agencies to award on a sole-source basis. Even in these situations, however, I feel there should be a double check for potential competition before the sole-source award is made. This legislation would generally require agencies to publish a notice of their prospective contracts over $25,000 in the Commerce Business Daily. The objective is to alert contractors, who may be capable of meeting the agency's needs but would have otherwise not known of the contract, to submit offers. For contracts over $100,000, moreover, S. 338 would require review by the head of the procuring activity, or his or her designee, before these contracts are negotiated noncompetitively.

The Competition in Contracting Act builds on existing statutes to enhance the use of competition in Government contracting and to restrict sole-source award to only those cases where it is truly warranted. Within the new statutory framework, the evaluation and award procedures would be the same as those currently required for formal advertising and negotiation. Considering the history of Comptroller General and court decisions which have interpreted the present evaluation and award procedures, and, more significantly, the familiarity which results from over 30 years of experience, I am confident this legislation can be quickly and easily implemented.

This is not to suggest, however, that S. 338 is a perfect bill. I realize that some language changes may be desirable to clarify intent and to accommodate legitimate concerns. For example, additional language may be desirable to clarify that the bill does not prohibit the use of sole-source contracts for brand-name products that are resold in military commissaries.

I strongly believe that the Competition in Contracting Act sets forth a workable solution to the costly problem of excessive sole-source contracting.

I believe these exemptions provide the flexibility that is necessary, on the one hand, to balance the need for almost a strict adherence to the absolute preference for competition in our contracting procedures, while on the other hand, recognizing that some flexibility is also needed. S. 338 would not, however, allow the kind of flexibility that we have had in the past which has resulted in the wholesale invocation of competition being impracticable.

I realize this particular bill is not total in its wisdom. I suspect it will be subject to modification. I am certainly happy to entertain any recommendations for modification, but I believe S. 338 represents the best wisdom of the Governmental Affairs Committee.

Chairman TOWERS. Thank you, Senator Cohen.

Our first witness this morning is Mary Ann Gilleece, Deputy Under Secretary of the Department of Defense for Acquisition Management. Ms. Gilleece is joined by Mr. Harvey Gordon, the Assistant Deputy Under Secretary, and Mr. Dennis Trosch, the Assistant General Counsel for Logistics of the Department.

Our second witness this morning is Robert Gilroy, Senior Associate Director of the National Security and International Affairs Division of the General Accounting Office. Mr. Gilroy is joined by Mr. Sidney Wolin and Mr. Kevin Tansey, both group directors with Mr. Gilroy at GAO.

If the committee is agreeable, we will hear from both witnesses before we proceed to questions.

Let me first recognize Ms. Gilleece.

STATEMENT OF MS. MARY ANN GILLEECE, DEPUTY UNDER SECRETARY OF THE DEPARTMENT OF DEFENSE FOR ACQUISITION MANAGEMENT, ACCOMPANIED BY HARVEY GORDON, ASSISTANT DEPUTY UNDER SECRETARY, AND DENNIS TROSCH, ASSISTANT GENERAL COUNSEL FOR LOGISTICS

Ms. GILLEECE. Thank you, Mr. Chairman.

It is indeed a pleasure to appear before this committee today.

I would like to ask that my prepared statement be entered in the record.

Chairman TOWER. Let me say that both witnesses may submit their statements for inclusion in the record in their entirety and then may summarize them as they see fit.

You may also submit any supporting material or documents for inclusion in the record as well.

Ms. GILLEECE. Let me begin by saying that the Department does appreciate and does support Senators Cohen's and Levin's efforts in the procurement area. We recognize the need for procurement reform. We support the thrust of S. 338 and also support the need for increased competition where appropriate.

I would like to divide my remarks into three areas.

First, I would like to scope the problem; second, address some major changes that the Department recommends and supports to S. 338; and third, share with the committee some very specific recommendations and the reasons why those specific recommendations are being made.

Government procurement is indeed a large endeavor. Within the Department of Defense there are yearly 13 million actions totaling approximately $125 billion.

Furthermore, within the Department there are 20,000 people directly involved in the formation and negotiation of contracts and another 26,000 people involved in contract administration. This is about 75 percent of the total Government-wide work force in this functional area.

It is a highly professional work force and its continued development is important. The basic procurement law for the Department of Defense, known as the Armed Services Procurement Act of 1947, as Senator Cohen mentioned, has essentially remained intact since the time of its original passage.

While we support procurement reform, we must recognize that because the law has been in effect since that time a number of court decisions, and decisions by the Comptroller General, have interpreted and defined the law's provisions. Therefore, we must be extremely careful in any changes that we make to the procurement legislation not to ignore these decisions.

S. 338 is one of several legislative initiatives in recent years intended to change our basic procurement statute. It contains features reported by the Commission on Government Procurement more than a decade ago. It is similar to H.R. 2545, a companion bill in the House.

It also has similarities to the uniform Federal procurement system as recommended by the Office of Federal Procurement Policy. While we have consistently endorsed the need to improve the basic procurement legislation, and we support the thrust of S. 338, there is a need for certain changes to tailor legislation toward the needs of the Department of Defense.

S. 338, as I have suggested, would amend the Armed Forces Procurement Act which is embodied in chapter 137 of title 10 of the United States Code. Currently that law, as mentioned by Senator Cohen, deals with formal advertising and negotiation.

Probably one of the most misunderstood and misconstrued areas is the fact that people understand formal advertising to be competitive, but do not recognize that negotiation is often competitive.

For many years the Department has been troubled by the fact that otherwise knowledgeable people have equated competition to formal advertising alone, overlooking the use and benefits of competitive negotiation. Therefore, the Department believes that such a change as Senator Cohen suggests would be supportive of the defense effort to obtain more effectively the benefits of competition in defense procurement.

The bill S. 338 does address this considerable change in time-honored procurement procedures. We believe that there are some changes that are needed to achieve the objective of making the legislation equate with today's environment and thorough, careful implementation of the bill's revisions to encourage more effective and efficient contracting.

I would like to summarize the major changes that we would like to see implemented.

The bill, while defining competitive procedures as either the use of sealed bids, which is similar to formal advertising, or request for proposals, continues to provide a preference for sealed bids.

In the Governmental Affairs report, page 17 on S. 338, there is a section entitled "Establish an Absolute Preference for Competition." We concur with and prefer this for competition.

However, we would not like to see a preference given to sealed bids as opposed to putting competitive negotiation on the equal status with the sealed bid procedure. I quote from the report on S. 338:

"S. 338 removes the restriction from and written justification required for—competitive negotiation, and places it on a par with formal advertising."

We suggest that the sealed bid procedure and the competitive-negotiation procedure be on an equal par with no preference given for sealed bids as set forth in S. 338.

We believe the bill should include four additional circumstances for use of noncompetitive procedures. Senator Cohen defined for us the six that are now included in S. 338, but the Defense Department believes that an additional four to meet the specific needs of the Department are necessary. Those are as follows:

First, where the contract is for technical or special property that would require duplicative substantial investment, there should be an exception. As previously noted, there are major systems where it would not be appropriate to tool up a second source, for example, the purchase of F–15s. This section would apply mainly to follow-on contracts in the major systems area.

Second, where it is desirable to establish an alternate source for future competition. The current exception where this may be considered deals with the defense industrial base situation.

We would like to establish second sourcing for future competition as an exception. This would provide us clear authority to preclude an incumbent contractor with capacity and capability from bidding, thus thwarting our effort to establish such an alternative source.

Third, provide an exception where the head of the agency may determine it is necessary to award a contract on other than a competitive basis. We must recognize that there will be situations, unforseeable at this particular time, that may be very unique where in the wisdom of the contracting officer other than a competitive contract should be awarded. The exception, however, would have to be approved at a level much higher than the contracting officer.

The fourth circumstance would be an exception permitting award of a noncompetitive contract based on an unsolicited proposal where the proposal demonstrates a unique or innovative concept and is caveated by proprietary restrictions asserted by the offeror.

An unsolicited proposal is a type of proposal which is encouraged by the Commission on Government Procurement because it provides to the Government a means of receiving unique and innovative research developed by the contractor's money.

The Defense Department also recognizes that the bill provides for publication of advance notice of proposed procurement in a manner similar to S. 272 and a companion bill, H.R. 1043. These bills are currently pending in conference.

While we strongly support publicizing, we believe the requirements of S. 338 and S. 272 to be burdensome and counterproductive to efficient procurement practices. We recognize that synopsis is needed. However, current regulations do provide for appropriate synopsizing.

Under Executive Order 12352, signed by the President on March 17, 1982, one of the functions of the procurement executive is to be the advocate for competition. Title III of this legislation would require the establishment of advocates for competition. We believe that this matter is best handled by the executive branch and should be left to the regulatory process as opposed to inclusion in the legislation.

Further, Mr. Chairman, let me mention that on March 25 of this year Don Sowle, who is the Administrator of the Office of Federal Procurement Policy (OFPP), in a letter to Senator Roth as Chairman of the Governmental Affairs Committee, indicated that OFPP does agree with the concept of an advocate for competition. However, that office does not feel that there is a need for legislation in this area.

I would like at this time to address some very specific recommendations that we have made to S. 338. Again let me also mention that we do support the thrust of S. 338. I do not want us to lose sight of that fact as we go through some of the recommended changes to tailor the legislation to the needs of the Department.

We should continue to recognize that what we are doing here is considering legislation that affects 46,000 people. We must make absolutely sure that while we do impact the system, we do so in a way that will continue effective operation.

I will make reference to the recommended changes by explaining them as opposed to defining verbatim what they are since they are part of my statement.

The first one has to deal with the $25,000 threshold for small purchases. We believe that for petroleum products, the small purchase threshold should be set at $100,000. This recognizes the unique price structure of the petroleum industry.

The second recommendation concerns page 22 of the legislation and is a somewhat technical change. It would recommend the deletion of the word quotation. There is no small business.

The third recommendation relates to dual sourcing that I mentioned before. The change to the bill—page 22—provides for establishing or maintaining alternate sources for competitive purposes or mobilization purposes.

The Department believes that the authority to restrict existing sources from bidding when the need for competitive alternative or dual sourcing is necessary should be clarified in S. 338.

Recommendation No. 4 goes to the preference for sealed bids that I discussed before. We would not like to see a preference for sealed bids over competitive proposals.

Recommendation No. 5 pertains to the subsection on page 23 and provides for the use of noncompetitive procedures when property is available from only one source and no other property will satisfy the needs. This could be interpreted to require the Department's needs should be changed to avoid a sole source.

Such an interpretation could adversely affect the national defense by requiring a change of requirement merely to obtain competition. We would suggest the deletion of those words.

No. 6 deals with the public exigency exception, which currently is the second negotiation to formal advertising. The language of the bill includes the words "unusual and compelling urgency."

The Department suggests that we retain the words "public exigency" simply because of interpretation in a broad number of opinions by GAO, the Armed Services Board of Contract Appeals and the Court of Claims.

Once again many of our suggested changes are because of the interpretation, already existing in options of legal entities, as I suggested before. Next is the seventh recommendation which is to maintain the already existing statutory language concerning the expectation for maintenance of essential industrial capability and for mobilization purposes.

In No. 8 the Department is concerned that the use of noncompetitive procedures when required by international agreement or at the direction of a foreign government might be interpreted to include foreign military sales transactions within Chapter 137 of Title 16. These transactions are currently covered by the Arms Export Control Act and the Department believes those transactions should continue to be controlled by that Act.

Recommendation No. 9 deals with the exception where the statute requires purchase from another agency or from a specified source. Since the small business set aside program is one authorized by law and not required by law, we would suggest including within the legislation the words "authorized" in addition to "required by law."

No. 10 defines specifically the four additional authorities which I alluded to before as absolutely needed by the Department as exceptions to the competitive situation.

The statement provides the specific language in support of these exceptions.

No. 11 goes to notice to be published by the Secretary of Commerce. We support publicizing proposed procurements but believe this should be left to regulation.

However, we also recognize that section 8(e) of the Small Business Act which may be revised by S. 272 and/or H.R. 1043 will address this matter. We have defined our positions on that. The Department will support synopsizing in Commerce Business Daily regardless of whether it is by regulation or by law.

As to No. 12, the legislation before this committee does repeal certain legislation dealing with labor. It repeals it in such a way that it would not provide for the application of Walsh-Healey and Davis-Bacon Acts to purchases and contracts where other than sealed bid procedures are used. We recommend the inclusion in S. 338 of the application of these two acts as current legislation does.

Senator COHEN. Does DOD favor the continuation of Davis-Bacon?

Ms. GILLEECE. Senator Cohen, what we are suggesting is that we recommend the inclusion of Davis-Bacon and Walsh-Healey to other than sealed bid procedures.

Senator COHEN. That is what I said. You want to continue the Davis-Bacon application to sealed bids procedures.

It strikes me that this is somewhat inconsistent with the policy of the chairman and other members of this committee.

Ms. GILLEECE. Senator Cohen, what I was trying to suggest is that we do not wish to get into the policy area of Walsh-Healey and Davis-Bacon.

What we are trying to do is simply keep the recommendation consistent with the current legislation and not try to deal with the major policy issues that those two pieces of legislation obviously bring forth.

Recommendation 13 deals with the procedures for solicitation, evaluation, and award of contracts. Essentially what the Department of Defense has done by its very specific recommendation to S. 338 is to reorient that section to conform it to procedures that retain newer viable concepts in the content of an amalgamation of existing statutes and common law as developed in legal cases, through GAO decisions, ASBCA decisions, Court of Claims, et cetera. The statement includes three pages of suggestions for those particular procedures.

Recommendation 15 would be to eliminate the fee limitations concerning cost-plus-fixed-fee contracts for research and development and other procurements. The limitations are arbitrary and the Department would suggest the elimination of those two.

Recommendation 16 pertains to multiyear contracts for services as distinguished from supplies. There is some view that the section of current law, 2306(g) of chapter 137 limits to some extent the types of services that may be obtained under multiyear contracts. We believe it is appropriate to clarify this subsection in order that all types of services may be considered for multiyear contracting.

Senator COHEN. Are you referring to this bill or to the House bill?

Ms. GILLEECE. We are referring to the current existing law.

Senator COHEN. But in your comments about changes, are you referring to my bill or to the House bill?

Ms. GILLEECE. No, Senator Cohen. Right now what I am dealing with as far as our recommendation. is to incorporate in S. 338 a change to subsection 2306(g) of Title X, Chapter 137. We are recommending an addition to S. 338.

Senator COHEN. To make it conform to the House version?

Ms. GILLEECE. To make it conform to the Department of Defense's view.

Senator COHEN. More about that later.

Ms. GILLEECE. Yes, sir.

Recommendation 17 would change existing legislation, subsection 2306(h) of the current law. This deals with multiyear contracts for supplies. The law now only applies to the Department of Defense.

We suggest that this also should apply, this availability to utilize multiyear contracting be extended, to the Coast Guard and the National Aeronautics and Space Administration.

Recommendation 18 deals with an addition to section 2306. Currently, service contracts that are funded by annual appropriation cannot be extended beyond the fiscal year which they are entered into. The change would allow the award of a service contract for a 1-year period of time not necessarily concurrent with the fiscal year. By way of example, if one would contract for school buses, the school bus contract may begin on September 1 but the fiscal year begins on October 1.

We also recommend the following further amendments to S. 338:

Number 19 of our recommendations refers to the section on pages 33 and 34 that requires maintaining procurement statistics for other than small purchases. We already maintain records of procurement actions consistent wtih the requirement of the Office of Federal Procurement Policy Act.

This section would establish a costly administrative burden without a corresponding benefit.

Senator COHEN. Have you read Mr. Sowle's letter?

Ms. GILLEECE. Yes, sir.

The conforming amendments that are in S. 338 include one which would move back to $100.000 the threshold for the submission of cost on pricing data. I would like to comment on why the Department submitted a legislative proposal a few years ago to increase the threshold for obtaining cost on pricing data.

First we proposed the increase from $100,000 to $500,000 in part to account for the impact of inflation that has occurred in the national economy since the inception of the Truth in Negotiations Act of 1962.

Second, the inception of the Truth in Negotiations Act in 1962 was intended to provide to us information concerning cost on pricing data. However, at this point we also recognize a need to ameliorate the paperwork burdens on contractors, in particular on small business contractors, and to permit more efficient use of the Department of Defense resources.

Increasing the threshold to $500,000 has significantly reduced for the Government as well as its contractors the volume of paperwork incident to administering the requirements of the Act.

The increased threshold, however, has not diminished the value of the act because the total dollar value of DOD procurement subject to the Act has been reduced by a relatively insignificant amount. At the time the legislation was proposed we reported that certified cost on pricing data, and this was in 1978, were submitted and considered in 7,034 procurement actions involving more than $100,000 for a total of $15.6 billion. Reporting in 1978 appears to be understated but the relative significance would remain the same.

Of those 7,034 actions, 2,442 involved more than $500.000 and had a value of $14.5 billion. Thus, with the 65 percent reduction in paperwork requirement we would cover 93.4 percent of the expenditures that were subject to the requirement.

An update of this information for the last 2 fiscal years shows that we had 65,666 actions involving more than $100,000 for a total of approximately $73.8 billion. Of those 65,666 actions, 13,782 involved more than $500,000 and had a value of $68 billion.

Therefore, with the 790 percent reduction in paperwork requirement we continue to cover 92 percent of the expenditures even though the threshold has been raised from $100,000 to $500,000.

Mr. Chairman, I would also like to comment on the impact this has had on the small business arena. In the 1981 fiscal year there were 7,575 actions over $100,000 dealing with small business. Of those 6,802 actions were between $100,000 and $500,000.

Therefore, we have eliminated for the small businesses 90 percent of those having to file certified cost on pricing data. The 773 remaining continue to have to file.

In fiscal year 1982, of the 6,949 actions over $100,000 awarded to small businesses, 948 of them had to file cost on pricing data. Therefore, for small business we eliminated the paperwork on 86 percent of them.

May I suggest, Mr. Chairman, that many of the small businesses are not even cognizant of what the Truth in Negotiation Act is, never mind what the requirements might be under the Act. If you talk to a small business in Tulsa who might be a subcontractor to McDonnell-Douglas he is trying to perform in the best way he can for the Department. We certainly should consider the elimination of the paperwork burden on his behalf.

We do not, however, lose the availability to the contracting officer at any time he or she wishes to request certified cost on pricing data.

The Department, therefore, would strongly recommend leaving the cost or pricing data threshold at $500,000.

Concerning the conforming amendment on page 36, we would make minor deletions. Coexistant with recommendation 14 in my statement to delete current subsection 2306(c) concerning approval of the use of cost-types contracts, we would delete the requirement that this directive be in writing. In addition, we would eliminate the needless paperwork in the requirement to end copies of certain findings to delete the GAO audit mission in foreign contracts to GAO.

Our next recommendation deals with establishing advocates for competition. As I mentioned, the Department recommends that advocates for competition be a matter of regulation. The Department has already established advocates for competition. However, we would like the flexibility to be able to amend our regulation as the need arises.

The final recommendation deals with the enactment of the legislation S. 338 provides for an effective date of 180 days after enactment. I think because of the pervasive impact this will have on the procurement system that the effective date should be changed to 365 days.

Mr. Chairman, the Department is concerned about the number of recommendations and amendments that it supports to S. 338. It should be recognized that H.R. 2545 does incorporate the vast majority of the recommendations I have described today.

In summary, the Department fully supports competition and clearly supports the need for procurement reform at this time. This bill, H.R. 2545, the uniform Federal procurement system and other bills have addressed the need of procurement reform.

We would support the need for that today as long as that need took into consideration the current and ongoing needs of the procurement system within the Department of Defense.

Mr. Chairman, that concludes my formal statement. Mr. Gordon and Mr. Trosch who are accompanying me today have in total almost 50 years experience in acquisition within the Department and I would be pleased if they would be able to speak freely in response to any questions that the committee might have. We would be pleased now to respond to your questions.

Thank you.

[The prepared statement of Ms. Gilleece follows:]

PREPARED STATEMENT OF MARY ANN GILLEECE, DEPUTY UNDER SECRETARY OF DEFENSE FOR RESEARCH AND ENGINEERING (ACQUISITION MANAGEMENT), DEPARTMENT OF DEFENSE

Mr. Chairman and members of the committee, I appreciate the opportunity to discuss S. 338, a bill to revise the procedures for soliciting and evaluating bids and proposals for government contracts and awarding such contracts, and for other purposes.

Government procurement is a large endeavor by any standard. Federal Government contract actions in fiscal year 1982 were almost 19 million for a total of $159 billion. The DoD share of this was 13 million actions for $125 billion. DoD has approximately 20,000 people working directly in the formation and negotiation of contracts and another 26,000 people involved in contract administration. This is about 75 percent of the total government-wide workforce in this functional area. This is a professional workforce and its continued development receives our strong support. Our basic procurement law, unchanged for the most part since its inception in 1947, has accommodated this volume of contract actions and provided the means to acquire highly sophisticated weapon systems. Built upon our basic law are court interpretations, decisions by the Comptroller General, and host of clarifying and implementing policies to effect procurement in todays world.

This bill is one of several legislative initiatives in recent years intended to change our basic procurement statute. It contains features recommended by the Commission on Government Procurement more than a decade ago. It is similar to a bill now pending in the House, H.R. 2545, which would impact only Defense procurement. We have consistently endorsed the need to improve our basic procurement legislation and we support the thrust of S. 358, but believe certain changes are necessary in the bill.

Of significance the bill would amend the Armed Services Procurement Act of 1947 as now codified in chapter 137 of title 10 of the United States Code by changing the philosophy and concept of the Act from formal advertising versus negotiation to competitive versus noncompetitive. This is a change that has long been needed to recognize that advertising is but one of several methods of effecting competition. For many years, we have been troubled that otherwise knowledgeable people have equated competition to formal advertising alone, overlooking the use and benefits of competitive negotiation. We believe this change would be supportive of our efforts to obtain more effectively the benefits of competition in Defense procurement.

This bill, as well as the Administration's proposal for a Uniform Federal Procurement System of 1982 and H.R. 2545, address this considerable change in time-honored procurement procedures. However, formal advertising and negotiation have been with us for many years, and the procedures are well understood and accepted by industry and Defense personnel. To accommodate this legislation, changes would be required in regulations, procedures, practices, and forms. In addition, some retraining of the procurement work force would be required. Our desire and objective is to minimize these changes by retaining present procurement concepts where they still make sense in today's environment and through careful implementation of the bill's revisions to encourage more efficient and effective contracting.

We believe some changes in the bill are needed to achieve this objective. The changes that we are proposing are appropriate in our judgment to avoid unintended results. If the meaning and method for changing our current statute is not clear, we can expect misunderstandings to crop up through challenges to contracting officer decisions and subsequent actions by administrative review bodies and judicial tribunals. This is often disruptive to an orderly and timely procurement process. Procurement is not an end in of itself, but a service inherent to the mission of assuring our national security.

Title I of the bill would amend the Federal Property and Administrative Services Act of 1949; Title II would amend the Armed Services Procurement Act of 1947 (Chapter 137 of title 10, U.S.C.); Title III would establish an advocate for competition in each executive agency and require annual reports on competition; and Title IV establishes an effective date of 180 days after enactment. My comments will address Title II, III, and IV.

Before detailing the changes, I might summarize several of the more significant matters. The bill, while defining competitive procedures as either the use of sealed bids (formal advertising) or requests for proposals, provides a preference for sealed bids. We believe that there should be no preference, but a recognition that they are equally valid procurement techniques.

We believe that the bill should include four additional circumstances for use of noncompetitive procedures. First, where the contract is for technical or special property that would require duplicative substantial investment. This would apply, for example, to annual follow-on production contracts for major weapon systems. Second, where it is desirable to establish an alternative source for future competition. This would provide us clear authority to preclude an incumbent contractor with capacity and capability from bidding, thus thwarting our effort to establish an alternative source. Third, the head of the agency may determine it is necessary to award on other than a competitive basis. This would provide authority at a high level to handle unique situations currently unforeseen. Last, authority to award based on au unsolicited proposal where the proposal demonstrates a unique or innovative concept and is caveated by proprietary restrictions asserted by the offeror.

The bill provides for publication of advance notice of proposed procurements in a manner similar to S. 272 now pending in conference. While we strongly support publicizing, we believe the requirements of S. 338 and S. 272 to be burdensome and counterproductive to efficient procurement practices. The 15-day wait between publication of notice and issuance of a solicitation would, in a great number of cases, only add to procurement leadtime and unduly delay the procurement process. We now publicize such actions in accordance with Section 8(e) of the Small Business Act. In our view publicizing and related matters are more suitable to regulation. However any statutory changes to publicizing should be enveloped in Section 8(e) of the Small Business Act to avoid duplication or potentially conflicting requirements.

Under E.O. 12352 one of the functions of the procurement executive is to be the adovate for competition. Title III to the bill would require, (1) establishing advocates for competition with certain duties, and (2) annual reports. DOD required the establishment of advocates for competition with specified duties in November 1981. The Services and DLA have established such advocates. We believe that this matter is best handled by the Executive Branch and should be left to regulation.

One last comment before pursuing our specific recommendations. Title IV of the bill requires that the changes contained in S. 338 be applicable to contracts entered into 180 days after the bill is enacted. This is not enough time for us to make an orderly transition from the present statute to new legislation. With over 800 buying offices worldwide processing millions of actions each year and spending billions of dollars we must ensure that any changes are properly implemented.

I would now like to provide our detailed recommended changes to the bill which we believe will improve our ability to perform effectively and efficiently in accord with the overall thrust of the bill. Because the bill would amend sections of the current statute, I believe numbering these changes and sequentially flowing them with the current statute will assist the committee.

1. Subsection 2303(5), pg. 21, line 11.

This subsection defines a small purchase as any purchase or contract which is not more than $25,000. We feel that this limit does not recognize the unique price structure of the petroleum industry. We feel that there will be greater efficiency in the acquisition of relatively small quantities of petroleum products if the small purchase threshold is changed.

We recommend: Addition of the words "or in the case of purchases of contracts for petroleum or petroleum products where the aggregate amount involved is not more than $100,000" after "$25,000" and before the period.

2. Subsection 2304(a), pg. 22, line 13.

This subsection provides for use of competitive procedures. In so doing the agency shall solicit bids, proposals, or quotations. The term quotation is not defined. Used in this context there is an improper connotation that the solicitation of quotations is strictly a competitive procedure.

We recommend: Deletion of the words "proposals, or quotations" and substitution of the words "or proposals".

3. Subsection 2304(b), pg. 22, lines 15–23.

This subsection provides for establishing or maintaining alternate sources for competitive purposes or mobilization purposes. We believe the authority to restrict existing sources from bidding when competitive alternate or dual-source techniques are being used needs to be clarified.

We recommend: Deletion of this subsection and substitution of the following new subsection.

"(b) The head of an agency may provide for the purchase of property or services covered by this chapter using competitive procedures but excluding a particular source or by any other action designed to establish or maintain an alternative source for that property or service—

"(1) if to do so would be likely to increase or maintain competition and would be likely to result in lower overall costs to the United States for the purchase (or anticipated future purchase) of that property or service; or

"(2) if (A) it is in the interest of national defense to have a facility, or a producer, manufacturer, or other supplier, available for furnishing the property or service in case of a national emergency, or (B) the interest of industrial mobilization in case of such an emergency, or the interest of national defense in maintaining active engineering, research, and development, would otherwise be subserved."

4. Subsection 2304(d), pg. 23, lines 1–15.

This subsection provides for use of competitive procedures by sealed bids or requests for proposals. However, the bill's language establishes a preference for sealed bids over competitive proposals. We believe that the statutory preference should be for competition with sealed bids and competitive proposals recognized as equally acceptable procurement techniques. We believe the preference for sealed bids should be eliminated but guidance provided for consideration in determining what form of competitive procedure to use.

We recommend: Deletion of this subsection and substitution of the following new subsection.

"(d) When a contract will be made using competitive procedures, the head of an agency, in determining what form of competitive procedures to use, shall consider—

"(1) whether the award of the contract may be made on the basis of price alone;

"(2) whether it is necessary to conduct discussions with offerors; and

"(3) such other matters as the head of the agency determines to be appropriate."

5. Subsection 2304(e)(1), pg. 23, lines 19–21.

This subsection provides for use of noncompetitive procedures when property is available from only one source and no other property will satisfy the need. The words, ". . . and no other type of property or services will satisfy the needs of the agency," could be interpreted to require that the Department's needs be changed to avoid a sole source. Such an interpretation could adversely affect the national defense by requiring a change of requirements merely to obtain competition.

We recommend: Deletion of the words "and no other type of property of services will satisfy the needs of the agency."

6. Subsection 2304(e) (2), pg. 23, lines 22–25.

This subsection provides for use of noncompetitive procedures when property must be obtained for unusual and compelling urgency. We believe it preferable to utilize the existing and known concept of "public exigency" rather than incorporating a new and undefined concept of "unusual and compelling urgency."

We recommend: Deletion of this subsection and substitution of the following new subsection.

"(2) the need of the agency for the property or service is of such urgency that the public exigency will not permit the delay incident to the use of competitive procedures;".

7. Subsection 2304(e) (3), pg. 24, lines 1–4.

This subsection provides for use of noncompetitive procedures when necessary to maintain essential industrial capability and for mobilization purposes. We believe it appropriate to utilize existing statutory language, which has stood the test of time, to establish an exception to the use of competitive procedures which is vital to the national defense and industrial mobilization.

We recommend: Deletion of this subsection and substitution of the following new subsection.

"(3)(A) it is in the interest of national defense to have a facility, or a producer, manufacturer, or other supplier, available for furnishing the property or service in case of a national emergency, or (B) the interest of industrial mobilization in case of such an emergency, or the interest of national defense in maintaining active engineering, research, and development, would otherwise be subserved;".

8. Subsection 2034(e) (4), pg. 24, lines 5–11.

This subsection provides for the use of noncompetitive procedures when required by international agreement or at the direction of a foreign government. As written, the bill could be interpreted to include foreign military sales transactions within Chapter 137 of Title 10. Such transactions are currently covered by the Arms Export Control Act and should not be included in the procurement statute which applies only to purchases using appropriated funds.

We recommend: Deletion of this subsection and substitution of the following new subsection.

"(4) the terms of an agreement with a foreign government (or international organization) have the effect of requiring the use of procedures other than competitive procedures;".

9. Subsection 2304(e) (5), pg. 24, lines 12 and 13.

This subsection provides for use of noncompetitive procedures when a statute requires purchase from another agency or from a specified source. Since the Small Business 8(a) set-aside program for minority and disadvantaged contractors is authorized but not required at law, a change is necessary to clarify the noncompetitive basis for this type of program.

We recommend: Deletion of this subsection and substitution of the following new subsection.

"(5) the agency is authorized or required by law to make the purchase through another agency or from a specified source;".

10. Subsection 2034(e), pg. 23, following line 16.

This subsection providing for use of noncompetitive procedures is not sufficient. We believe that four additional authorities for using noncompetitive procedures are necessary.

The bill does not specifically authorize the use of noncompetitive procedures for the acquisition of technical property that requires a substantial initial investment or an extended period of preparation. This authority is embodied in 10 U.S.C. 2304(a)(14), the current Department of Defense procurement statute. Under the bill, as written, competition could be required for contracts for major programs already in production, such as the F-14, even though any other contractor would have to incur costly duplication of startup costs or require extensive time to meet the Department's mission requirements. An exception is required to clarify the noncompetitive reality of such acquisitions.

We recommend: The addition of the following new subsection.

"(7) the purchase or contract is for technical or special property—

"(A) that requires a substantial initial investment or an extended period of preparation for manufacture; and

"(B) for which competitive procedures would be likely to result in additional cost to the Government by reason of duplication of investment or would result in duplication of necessary preparation which would unduly delay the procurement of the property;"

An additional exception is required as a technical matter to provide dual-sourcing authority to award a contract on a noncompetitive basis in order to establish or maintain dual sources for competitive purposes. The exception in 2304(e)(3) only provides such authority when the purpose is to further industrial mobilization or protect essential industrial capability.

We recommend: The addition of the following new subsection.

"(8) it is necessary to award the contract to a particular source in order to establish or maintain an alternative source of supply for the property or service and that to award the contract to that source would be likely to increase or maintain competition and would be likely to result in lower overall costs to the United States for the purchose (or anticipated future purchase) of the property or service;"

There is no exception from the use of competitive procedures that would allow agency discretion to permit noncompetitive procedures to be used in situations that cannot be currently foreseen. Therefore, an additional exception should be included that would allow the use of noncompetitive procedures when the head of an agency determines that the use of competitive procedures would be inconsistent with the public interest. Adequate safeguards would be included to provide that the authority to make the required determination cannot be delegated below the level of assistant secretary or equivalent.

We recommend: The addition of the following new subsection.

"(9) the head of the agency determines that it is necessary to award the contract on other than a competitive basis and that it is not inconsistent with the public interest to do; or"

"(f) The authority of the head of an agency to make determinations under subsection (e)(9) may not be delegated below the assistant secretary or equivalent level."

The Department of Defense obtains a number of innovative research and development ideas and concepts from industry through voluntary proposals. Where such proposals are worthy of further development, the development is contracted for on a noncompetitive basis—a vital incentive for the submission of such proposals. The bill would eliminate this incentive by requiring competition for the development of ideas contained in unsolicited proposals. It should be revised to authorize acceptance of truly unsolicited proposals that demonstrate a unique or innovative concept without competition.

We recommend: The addition of the following new subsections.

"(10) the contract to be awarded results from acceptance of an unsolicited proposal that demonstrates a unique or innovative concept or scientific merit or capabilities not available elsewhere, without improperly disclosing the originality of thought and the creativity and innovativeness of the proposed approach."

"(g) For the purpose of subsection (e)(10), an unsolicited proposal is a proposal that is submitted to an agency on the initiative of the submitter with the purpose of obtaining a contract with the United States and that it is not in response to a formal or informal agency request (other than an agency request constituting a publicized general statement of need in areas of science and technology-based research and development that are of interest to the agency)."

11. Subsection 2304(f), pg. 24, lines 17–25 and pg. 25, lines 1–10.

This subsection requires when using noncompetitive procedures a notice to be published by the Secretary of Commerce; and in contracts exceeding $100,000, approval by head of organizational element responsible for such contracts. Our regulations already require higher level approval of noncompetitive contracts. We believe the notice requirement to the Secretary of Commerce for publication in the Commerce Business Daily inappropriate for inclusion in this bill. Section 8(e) of the Small Business Act as implemented by existing regulation adequately addresses advance notice of contracts. This new procedure would create needless publication requirements.

We recommend: The deletion of this subsection and the substitution of the following new section. This new section retains the requirement for higher level approval of the use of noncompetitive procedures in contracts exceeding $100,000.

"(h) The head of an agency may not award a contract exceeding $100,000 using noncompetitive procedures unless the use of such procedures is approved by the head of the organizational element of such agency which has the responsibility to enter into such contract or by a designee of the head of such organizational element who is higher in such organizational element than the contracting officer issuing the solicitation with respect to such contract."

12. Section 2304, pg. 25, following line 10.

The bill would repeal current subsection 2304(e) which provides for application of the Walsh-Healey and Davis-Bacon Acts to purchases and contracts using other than sealed-bid procedures. We believe that the thrust of the current subsection should be retained.

We recommend: The addition of the following new subsection to retain the thrust of the current statute.

"(i) For the purposes of the following laws, purchases or contracts made under this chapter using other than sealed-bid procedures shall be treated as if they were made with sealed-bid procedures:

"(1) The Act entitled 'An Act to provide conditions for the purchase of supplies and the making of contracts by the United States, and for other purposes, approved June 30, 1936 (commonly referred to as the Walsh-Healey Act) (41 U.S.C. 35–45).

"(2) The Act entitled 'An Act relating to the rate of wages for laborers and mechanics employed on publish buildings of the United States and the District of Columbia by contractors and subcontractors, and for other purposes', approved March 3, 1931 (commonly referred to as the Davis-Bacon Act) (40 U.S.C. 276a—276a–5)."

13. Section 2305, pgs. 25–32

This section provides procedures for solicitation, evaluation and award of contracts. In addition, it provides for publication of advance notice of contracts. We believe Section 8(e) of the Small Business Act, without the amendments prescribed by S. 272, as implemented by existing regulations adequately addresses advance notice of contracts. The new procedures would create burdensome and unnecessary publication requirements that serve no useful purpose. While we are in general accord with the bill's procedures for solicitation, evaluation, and award of contracts, we believe that reformating those procedures in a manner that retains language from current law is most desirable.

We recommend: The deletion of section 2305 and the substitution of the following new section.

"Section 2305. Solicitations for and evaluation of sealed bids and competitive proposals; award of contracts.

"(a) Each solicitation for sealed bids or competitive proposals issued by the head of an agency under section 2304 of this title shall include specifications for the property or services to be purchased—

"(1) that consistent with the needs of the agency, promote effective competition; and

"(2) that include restrictive provisions or conditions only to the extent necessary to meet the needs of the agency or as required by law.

"(b) Sealed bids shall be opened publicly at the time and place stated in the invitation for bids. The head of the agency shall evaluate the bids without discussion with the bidders and shall award a contract with reasonable promptness to the responsible bidder whose bid conforms to the invitation and will be the most advantageous to the United States, price and other factors considered. The award of a contract shall be made by giving written notice of the award to the successful bidder.

"(c) (1) In all competitive procurements carried out with other than sealed-bid procedures in which rates or prices are not fixed by law or regulation and in which time of delivery will permit—

"(A) proposals (including price) shall be solicited from a number of qualified sources consistent (i) with the nature and requirements of the property or services to be procured, and (ii) with the interests of the agency in effective and efficient competition; and

"(B) except as provided in paragraph (2), written or oral discussions shall be conducted with all responsible offerors who submit proposals within a competitive range, price and other factors considered.

"(2) The requirements of paragraph (1) with respect to written or oral discussion—

"(A) need not be applied—

"(i) to procurements that implement authorized set-aside programs or to procurements where it can be clearly demonstrated from the existence of competition or accurate prior cost experience with the property or service that acceptance of an initial proposal without discussion would result in a fair and reasonable price; and

"(ii) where the solicitation of proposals notifies all offerors of the possibility that award may be made without discussion; and

"(B) may not be construed to prevent communications with an offeror for the purpose of minor clarification of a proposal submitted by that offeror.

"(d) The head of an agency may reject all bids or proposals received in response to a solicitation for sealed bids or competitive proposals if the head of the agency determines that such action is in the public interest.

"(e) If the head of the agency considers that any bid or proposal received after a solicitation for sealed bids or competitive proposals evidences a violation of the antitrust laws, he shall refer the matter to the Attorney General for appropriate action.

"(f) This section does not apply to a procurement for an amount less than the small purchase ceiling."

In addition to the foregoing recommended changes, we also suggest the following additional revisions to current law:

14. Subsection 2306(c) of current law.

This subsection in the current law requires higher level approval of the use of cost, cost-plus-a-fixed-fee or incentive contracts. The requirement to justify use of these types of contracts on a contract-by-contract basis is burdensome paperwork. Needless paperwork and administrative costs can be reduced by leaving selection of the contract type to regulation.

We recommend: The repeal of current subsection 2306(c).

15. Subsection 2306(d) of current law.

This subsection provides a fee limitation on cost-plus-a-fixed-fee contracts for research and development (15 percent) and all other procurements using this type of contract (10 percent).

In our view, the advent of an administrative procedure, the weighted guidelines method of determining profit or fee, providing contracting officers with a rational technique that insures consideration and documentation of the relevant factors compensated by fee, negates the need or purpose of imposing statutory fee limitations. The current statutory fee limitation mitigates against acceptance by contractors of a fixed fee arrangement when it would otherwise be in the best interest of the Government. This often results in the inappropriate use of other types of contracts in order to come to agreement with a contractor. Accordingly, we recommend eliminating the 10 and 15 percent fee limitations on cost type contracts.

We recommend: The deletion of the first, third and fourth sentence of subsection 2306(d) concerning fee limitations on research and development and other procurement using cost-plus-fixed-fee contracts. We would retain the second sentence concerning cost limitations on the procurement of architectural or engineering services, but add the words "at the time the contract is made" after "estimated costs" in the retained sentence.

16. Subsection 2306(g) of current law.

This subsection provides for use of multiyear contracts to obtain services as distinguished from supplies. There is some view that it limits to some extent types of services that may be obtained under multiyear contracts. We believe it appropriate to clarify this subsection in order that all types of services may be considered for multiyear contracting. The clarification would eliminate high startup costs or substantial contingent liability concerning a specialized work force as a condition for use of multiyear contracting. The proposed change would expand use of multiyear acquisition techniques and could result in cost savings in both the administration of contracts and cost of services and related supplies.

We recommend: The revision of Subsection 2306(g) as set forth below.

(g)(1) The head of an agency may enter into contracts for periods of not more than five years for [the following types of] services (and items of supply related to such services) for which funds would otherwise be available for obligation only within the fiscal year for which appropriated—

[(A) operation, maintenance, and support of facilities and installations;

[(B) maintenance or modification of aircraft, ships, vehicles, and other highly complex military equipment;

[(C) specialized training necessitating high quality instructor skills (for example, pilot and other aircrew members; foreign language training); and

[(D) base services (for example, ground maintenance; inplane refueling; bus transportation; refuse collection and disposal);] whenever he finds that:

"(A)"(i) there will be a continuing requirement for the services consonant with current plans for the proposed contract period; "and"

[(ii) the furnishing of such services will require a substantial initial investment in plant or equipment or the incurrence of substantial contingent liabilities for the assembly, training, or transportation of a specialized work force; and]

"(B)"(iii) the use of such a contract will promote the best interests of the United States by encouraging effective competition and promoting economies in operation.

17. Subsection 2306(h) of the current law.

This subsection provides authority to Defense to enter into multiyear contracts for supplies. While the current Chapter 137 of Title 10 of the U.S.C. applies to the Coast Guard and the National Aeronautics and Space Administration (NASA), this subsection precludes them from entering into multiyear contracts.

We recommend: The following revisions in Subsection 2306(h) of the current statute which will extend to the Coast Guard and NASA multiyear contracting authority.

(A) in paragraph (1)—

(i) by inserting "(or, in the case of a contract by the Coast Guard or the National Aeronautics and Space Administration, will promote the national interest)" in clause (A) after "United States"; and

(ii) by striking out "the Department of Defense will request funding" in clause (C) and inserting in lieu thereof "funding will be requested";

(B) in paragraph (2)—

(i) by striking out "The Secretary" in subparagraph (A) and all that follows through "regulations" and inserting in lieu thereof "The Secretary of Defense, the Secretary of Transportation, and the Administrator of the National Aeronautics and Space Administration shall prescribe regulations."

(ii) by striking out "defense" in subparagraph (C); and

(iii) by striking out "in the Department of Defense" in subparagraph (D) and inserting in lieu thereof "named in section 2303 of this title"; and

(C) by striking out paragraph (7) and redesignating paragraph (8) as paragraph (7).

18. Section 2306 of the current law.

Currently, with few exceptions, service contracts that are funded by an annual appropriation cannot extend beyond the fiscal year in which they are entered into. This creates an extraordinary administrative problem in attempting to line up such contracts on the fiscal year. It would greatly reduce this burden and increase DoD efficiency by simply providing that such contracts can be entered into any time during the fiscal year but for only one year. Thus the acquisition process is streamlined and Congress can still retain oversight through the funding process.

We recommend: The addition of the following new Subsection 2306(i).

"(i) When use of a multiyear contract under subsection (g) is not appropriate, appropriations otherwise available for obligation only within the fiscal year for which appropriated may be used for contracts for services for periods not in excess of 12 months beginning at any time during that fiscal year."

We also recommend the following further amendments to S. 338:

19. Section 2316, pgs. 33–34.

This action requires maintaining procurement statistics for other than small purchases. We already maintain records of procurement actions, consistent with the requirement of the Office of Federal Procurement Policy Act. This section would establish an excessive, unnecessary, and costly administrative paperwork burden without corresponding benefit.

We recommend: The deletion of Section 2316.

20. Conforming Amendments, pg. 35, lines 9 and 10 and lines 18–21.

This conforming amendment would repeal the recent meaningful procurement reform by lowering the threshold for submission of certified cost on pricing data from $500,000 back to $100,000. We cannot support this change. The reform has reduced administrative paperwork and allowed for more efficient use of scarce personnel resources.

We recommend: The reinstatement of the $500,000 figure.

21. Conforming Amendments, pg. 36.

Conforming amendment (a) provides for certain written findings and determinations and the transmittal of a finding to exclude the audit provision in foreign contracts to the General Accounting Office (GAO). Certain revisions are needed in this conforming amendment consistent with our recommendation in 13 above to delete current Subsection 2306(c) concerning approval to use certain types of contracts. In addition, we propose to eliminate needless paperwork in the requirement to send copies of certain findings to GAO.

We recommend: The following technical corrections in this conforming amendment.

(1) Delete "section 2306(c)," in line 8.

(2) Delete "clearly" in line 11 and all that follows through and including "(2)" in line 15.

(3) Change "(3)" to "(2)" in line 16.

(4) Change "(4)" to "(3)" in line 18.

(5) Delete the last sentence in subsection 2310(b), lines 23–25.

22. Title III, pgs. 37–40.

This title provides for establishing advocates for competition with certain duties and the submission of annual reports on competition. We are opposed to title III. We have already administratively established advocates for competition within the military departments with essentially the same responsibilities as those proposed. Thus, title III is seemingly intended to take current management initiatives and incorporate them into permanent law. We believe these are matters to be handled by the Executive Branch and should be left to regulation and therefore recommend this title be deleted.

23. Title IV, pg. 40, line 14.

This title establishes an effective date for amendments made by this Act of 180 days from enactment. The changes proposed by this bill will impact on our internal management and operating procedures, as well as on industry. It brings into question the 35 years of experience, interpretation, precedent, and refinement under the Armed Services Procurement Act that guide procurement today. Considering also that we have approximately 13 million procurement transactions for $125 billion annually, awarded by over 800 buying offices, the task of effectively implementing the bill, should it be enacted, is immense. It is important that the transition be accomplished in an efficient and effective manner with as little disruption as possible. This can only be accomplished through establishment of additional time to develop the necessary regulatory revisions, and train the procurement community.

We recommend: The effective date be changed to 365 days.

In summary, we support changing the philosophy and concept of competition in Federal procurement from formal advertising versus negotiation procedures to competitive versus noncompetitive procedures. It would establish statutory precepts that more closely represent the actual procurement environment. As indicated in my testimony however, DoD has several areas of concern regarding S. 338 which we believe need to be addressed.

This concludes my formal statement. I would be pleased to respond to your questions.

Chairman TOWER. Thank you, Ms. Gilleece.

Mr. Gilroy, you may read your statement in its entirety or you may submit it for the record along with any supporting materials and documents. You may proceed as you see fit.

STATEMENT OF ROBERT GILROY, SENIOR ASSOCIATE DIRECTOR OF THE NATIONAL SECURITY AND INTERNATIONAL AFFAIRS DIVISION, GENERAL ACCOUNTING OFFICE, ACCOMPANIED BY SEYMOUR EFROS, ASSOCIATE GENERAL COUNSEL FOR PROCUREMENT TRANSPORTATION LAW; SIDNEY WOLIN, GROUP DIRECTOR, NATIONAL SECURITY AND INTERNATIONAL AFFAIRS DIVISION, GENERAL ACCOUNTING OFFICE; AND KEVIN TANSEY, GROUP DIRECTOR, NATIONAL SECURITY AND INTERNATIONAL AFFAIRS DIVISION, GENERAL ACCOUNTING OFFICE

Mr. GILROY. I will try to summarize my formal statement.

Let me first introduce our people: Seymour Efros, Associate General Counsel for Procurement Transportation. Mr. Sidney Wolin and Mr. Kevin Tansey, group directors, from our National Security International Affairs Division who have had much experience with competition.

We are pleased to be here today to comment on S. 338. We strongly support the bill and believe that it could, if properly implemented, be an effective framework for improving Federal procurement. There are, however, a few areas where we believe technical improvements are needed in the bill and we would be glad to work with the committee on these matters.

MAGNITUDE OF THE PROBLEM

In fiscal year 1982, Federal Government contract awards totaled $159 billion, according to the Federal Procurement Data System, the official Federal procurement data base. Of this amount, 79 percent was awarded by the Department of Defense and 21 percent by Federal civil agencies. Federal contract awards exceeding $10,000 in value totaled $146.9 billion. Of this amount, about $54.5 billion (or 37 percent) was categorized as competitive. DOD's contract awards were 35 percent competitive.

Most of the dollars which Federal agencies obligated were for actions under existing contracts, such as modifications. Therefore, the initial or new contract decisions on which the subsequent actions are based are especially significant because they limit the Government to the use of the same contractor when contractor modifications are necessary.

MANY UNWARRANTED SOLE-SOURCE DECISIONS

Our office has examined statistical samples of new, sole-source contracts above the small purchase threshold awarded by the Department of Defense and six major Federal agencies to assess the adequacy of their noncompetitive decisions. The civil agencies were the National Aeronautics and Space Administration; the Veterans' Administration; and the Departments of Energy, Interior, Transportation, and Health and Human Services.

The reviews showed that the Department of Defense and these major civil agencies frequently did not base their contract awards on competition to the maximum extent practical. A July 1981 report, "DOD Loses Many Competitive Procurement Opportunities," dated

July 29, 1981, showed that the Department of Defense should have competed 25 (or 23 percent) of the 109 new, sole-source contracts GAO reviewed.

We estimated that DOD lost opportunities to obtain available competition on about $289 million in new fiscal year 1979 contract awards. In an April 1982 report, "Less Sole-Source, More Competition Needed on Federal Civil Agencies' Contracting," dated April 7, 1982, we estimated that for the six civil agencies reviewed competition was feasible on 32 percent of the new sole-source contracts in our universe. We also noted that an additional 8 percent could have been competitive with better agency planning or management. We estimated that six civil agencies lost opportunities to obtain available competition on $148.5 million or about 28 percent of the dollar value of our universe. The dollar amounts for both defense and civil agencies represent initial contract obligations, which in some cases may be substantially increased through later contract modifications.

The percentage of civil agency sole-source contract awards on which competition was found to be feasible varied from a low of 20 percent at HHS and 21 percent at NASA to a high of 73 percent at the Department of Energy and 49 percent at the Department of Transportation.

Basically both of these reviews show that: (1) Many contracts were awarded sole-source unnecessarily, and (2) specific actions should have been taken to insure that competition was obtained when available.

CAUSES OF MISSED OPPORTUNITIES TO OBTAIN COMPETITION

Why did agency officials fail to obtain competition on awards that could have been competitive? The major factors identified in both reports included:

Ineffective procurement planning or the failure of contracting officers to perform market research adequate to insure that sole-source procurement was appropriate.

Inappropriate reliance of procurement officials on the unsupported statements of agency program, technical, or higher level officials.

In addition, both reports show that a lack of commitment to competition on the part of key agency personnel was a major problem. Instances of overly restrictive specifications and failure to use available data packages to obtain competition were also found.

S. 338

Senate bill 338 proposes several important changes in the procurement statutes governing Federal agencies which address these and other problems.

First, the bill would remove the present strong statutory preference for sealed bidding and in its place substitute statutory provisions that: (1) Focus on competition, whether achieved through sealed bids or competitive proposals, and (2) seek to limit noncompetitive procurements. We agree that it is competition, not just competition through sealed bidding, that should be emphasized.

We also agree that noncompetitive procurements should be limited to very special and well-defined circumstances and have specifically recommended this type of requirement in a recent report.

Second, the bill would strengthen procedures for publicizing prospective awards consistent with one of our recommendations that we consider especially important. The bill would require for most purchases of over $10,000 that notices be published in the Commerce Business Daily—at least 45 days before the deadline for submission of bids, proposals, or quotations—and include a statement inviting bids, proposals, or other responses.

In our previously mentioned report, we analyzed civil agency officials' use of the Commerce Business Daily on a statistical sample of noncompetitive contracts. We found that agency officials publicized a notice which invited competition on the prime contract on only 2 percent of the awards.

On 39 percent of the awards, they publicized a preaward sole-source notice, which stated that the Government intended to negotiate with a particular contractor. These were in lieu of notices inviting competition. These sole-source notices are published for information purposes, such as alerting potential subcontractors to subcontracting opportunities. Although this purpose is worthwhile, we believe such notices fail to encourage additional proposals on the prime contract. Even less satisfactorily, no preaward notices at all were publicized for the remaining 60 percent of the awards and usually there was no valid exception to the regulatory requirement to publicize such notices. We believe this is an area of serious abuse which results in potential competitors being effectively restricted from competing. Therefore, we strongly support this provision in the bill.

Third, the bill requires agencies to use advance procurement planning and market research to obtain competition. As previously discussed, our recent reviews of defense and civil agencies' sole-source contracts identified ineffective procurement planning and inadequate market research as major deficiencies needing correction.

Fourth, the bill provides a Government-wide ceiling of $25,000 for small purchases. The Congress, in December 1981, raised the small purchase ceiling for the Department of Defense to $25,000. This bill would also raise it for civil agencies, which are currently held to the $10,000 ceiling which the Congress established in 1974. We support raising the ceiling to $25,000 Government-wide as long as reasonable competition is achieved. We believe the additional purchases to be made under simplified procedures will save administrative costs and reduce the paperwork burden on both the Government and small business.

As noted earlier, although we endorse S. 338, we believe there are several areas in which the bill could be improved. I will mention a few at this time and the remainder will be included in our formal statement for the record.

For example, although we would oppose any effort to add a specific exception to competitive procedures for unsolicited proposals, we suggest that the bill be revised to exempt agencies from conducting market research and publicizing a preaward notice in the Commerce Business Daily when these procedures cannot be performed without disclosing the unsolicited proposer's original thoughts, innovative approach, solution, or other proprietary information.

This should properly restrict the Government's market search for competitive sources to those situations in which it is appropriate. However, based on our reviews of contracts resulting from unsolicited proposals, we believe that agencies can with relatively few exceptions undertake such a market search for competitive sources to meet the Government's minimum requirements without disclosing such data.

In addition, we suggest that the bill or the Senate Committee on Armed Services' report on S. 338 clearly provide that the use of noncompetitive procedures is appropriate in awarding follow-on contracts that must be directed to a specified source because competition is not feasible. In such a case, agency officials should be required to demonstrate that a noncompetitive award is necessary to avoid:

(1) Unacceptable delays in accomplishing the agency's mission objectives, or

(2) Duplication of costs to the Government for the property or service being procured (that is, a substantial investment of some kind would have to be duplicated at Government expense by another source entering the field and because of the magnitude of these costs, recovering them through competition, would be highly unlikely).

However, the fact that the Government would incur some cost and/or delay by changing contractors is not, in and of itself, a sufficient reason for noncompetitive procurement.

Otherwise, we do not know of any situations for which noncompetitive procedures are appropriate, aside from those that would be covered by S. 338's six exceptions to the requirement to use competitive procedures, as set forth in the bill and further explained in the Senate Committee on Government Affairs' report accompanying S. 338.

However, we recognize there is always the possibility that in a few cases unforeseen circumstances may make noncompetitive procurement appropriate, even though this is not authorized under the six exception categories of S. 338.

To provide for such unforeseen circumstances, some have advocated adding an exception which would permit noncompetitive procedures to be used when the agency head determines that competition is impracticable. We are concerned that such an exception would be too easily misused if the agency head's authority could be delegated widely.

Therefore, we would support such an exception only if:

A clear expectation is stated that such an exception would be used very infrequently,

The specific reasons for any use of this exception must be disclosed and justified, and

The authority to use this exception could not be delegated to any official more than one level below the agency head. That is, only officials at or above the level of assistant secretary of any department or a comparable level in an independent agency should be able to authorize noncompetitive procurement on a basis other than that provided by S. 338's more specific exceptions.

We also suggest that the bill or its legislative history clearly reflect congressional intent that:

First, the use of noncompetitive procedures is permissible under the first exemption (title I, section 303(e)(1) and title II, section 2304(e)(1)) when data, such as drawings or other specifications, needed for competition is not available and there are no alternative ways of obtaining competition, such as redescribing the requirement in terms of function or performaance required. However, the agency is responsible for (a) avoiding such noncompetitive situations by making sure that adequate data is available for competition, or (b) demonstrating that obtaining such data is not in the Government's best interests.

Second, implementing regulations should require requesting officials to notify procurement officials as soon as requirements become known in order to avoid delays in the procurement process and allow reasonable time to obtain competition. Our work has shown that requesting officials do not always notify procurement officials in a timely manner when requirements are identified. This sometimes results in problems, such as the failure to publicize notices in the Commerce Business Daily due to the lack of time. This suggestion has become more important because S. 338 would lengthen the time period to 45 days between publication of the notice and the deadline for the submission of bids, proposals, or quotations.

Third, an award should not be considered competitive unless an agency enters into the contract after receiving in response to its solicitation sealed bids or competitive proposals from two or more independent sources that are capable of satisfying the agency's needs. Without such a minimum standard for competition we believe it is likely that agencies will classify many awards as competitive merely because they solicited competitive bids or proposals from more than one source, even though the benefits of competition, such as lower prices and better quality products and services, have not been achieved. This could have a dramatic but deceptive effect on Government procurement data and trends relating to competition.

This concludes my prepared statement. I will be happy to address any questions you may have.

Chairman TOWER. Thank you very much, Mr. Gilroy.

Ms. Gilleece, you express some reservation about a preference for sealed bids under circumstances where the competition involved is only a price competition.

Shouldn't such procurements be conducted on a sealed bid basis?

Ms. GILLEECE. Mr. Chairman, I had reference to the preference established in current law. This has been misconstrued, I am afraid, by many people. In other words, formal advertising is not the only kind of competition that we currently have.

We also have competition in negotiation. If we include this preference in the new legislation, we may continue that misunderstanding.

Also a contracting officer when he is determining which method of contracting to use should be able to utilize his discretion in that particular area.

Chairman TOWER. Why is the use of the public exigency exception more desirable than a variation of that which appears in S. 338, as reported by the Committee on Governmental Affairs?

Ms. GILLEECE. Mr. Chairman, since the Armed Services Procurement Act of 1947 there have been legal cases, GAO decisions, Armed Services Board of Contract Appeals decisions, Court of Claims decisions. Many of those have considered the public exigency exception.

The basis for the DOD recommendation that we continue to use those words as opposed to the words in S. 338 would be because of the longstanding cases that have defined this term since 1947.

Chairman TOWER. Mr. Gilroy, do you have any position on whether universities or Federal contract research centers should receive any special treatment in the procurement process?

Mr. GILROY. Let me turn to Mr. Wolin who is familiar with this area, Mr. Chairman.

Mr. WOLIN. On universities we believe many of these procurements could be competed.

However, in the case of the federally funded research and development centers we believe that there should be an exemption for these from competition. In the exemption FFRDC's should be specifically identified rather than broadly described so that other people can't slip in under this exemption.

We believe they ought to be identified and mentioned in the act as an exemption.

Chairman TOWER. I have some additional questions I would like to submit to the witnesses for response in writing for the record. I would appreciate it if you would respond in a timely fashion.

Senator Stennis.

Senator STENNIS. Mr. Chairman, I am impressed with this last point that has been raised here. In order not to delay the hearing, I would like the privilege of submitting questions.

Chairman TOWER. Senator Thurmond?

Senator THURMOND. Mr. Chairman, I wonder if someone from the Defense Department would just tell us briefly, do you recommend passage of the bill and what benefits will result if the bill is passed, in your opinion?

Ms. GILLEECE. Yes, we recommend passage of the bill with the recommended changes that we have just discussed. It would update the procurement authority to meet the current and contemporary need of procurement within the Department.

Senator THURMOND. Do you feel, as I understand, that this would provide more competition and, therefore, would be a benefit to the taxpayers and the Government?

Ms. GILLEECE. Senator, the competition issue is something that clearly concerns the Department. The Department has supported and will continue to support increased competition where appropriate. We believe that this legislation would be a very good management tool toward assisting in increasing competition within the Department.

Senator THURMOND. Is it your opinion that this bill would help the small business people? There are many who feel today the contracts are so large that they are unable to participate and therefore they can't compete.

Will this bill assist in that regard to give a better opportunity to small business?

Ms. GILLEECE. Senator, let me mention two things.

First of all, because this legislation is easier to understand for a small businessman, he does not have to determine what is formal advertising and negotiation, but rather he can understand the focus on competition. I think that it probably would be an advantage to the small businessman.

Let me say, however, that one of the conforming amendments, increasing the cost on pricing threshold, would have a negative effect on small business. Small businesses would be required in any contract over $100,000, if this conforming amendment passed, to file certified cost or pricing data.

Senator THURMOND. Do you feel that that amendment should be adopted? We want to give every opportunity to small businesses in this country.

Ms. GILLEECE. Senator Thurmond, I do not believe that the conforming amendment that was reported out by the Governmental Affairs Committee should be adopted. No, sir, I do not.

Senator THURMOND. Thank you very much.

Thank you, Mr. Chairman.

Chairman TOWER. Senator Exon?

Senator EXON. Thank you, Mr. Chairman.

I should like to ask Ms. Gilleece and Mr. Gilroy both to comment generally on this threshold proposition. We have been dealing with thresholds in a whole series of areas in all kinds of Government contracts.

As I understand it, within the last few years, we raised the threshold from $100,000 and the bill before us would put that back down to $100,000.

I take it from your testimony, Ms. Gilleece, that you think it should be left at $500,000; is that correct?

Ms. GILLEECE. Absolutely, sir.

Senator EXON. What is your viewpoint on that, as far as GAO is concerned, Mr. Gilroy?

Mr. GILROY. We believe the threshold should be returned to $100,000. We do not see the higher threshold as any real strong incentive to increase small business participation because we don't see that it is that much of a burden on contractors. If you submit a proposal for $200,000 or $300,000, you certainly have cost on pricing data to support that.

What it does by having the threshold at $100,000 is for the certification by the contractor that the data supporting his price is accurate, current and complete. It is a certification, we believe, that can serve as a deterrent to contractors submitting inaccurate, nonconcurrent or incomplete data.

So, we believe the threshold should return to the $100,000 level.

Senator EXON. What is the rationale? Is this just a figure that has been arrived at? What is the rationale for $100,000 or what is the rationale for $500,000? Is there any?

Mr. GILROY. That is a good question, sir. I do not believe there is any definite rationale. I am not sure where the $100,000 came from initially. However, we have found that the Defense Contract Audit Agency has had large returns to the Government on preawarded audits of contract proposals between $100,000 and $500,000.

We have asked them for statistics and they have provided them. I may even have some of the statistics here. DCAA provided us with fiscal year 1980 data which shows they achieved net savings of $173.9 million from audits of 13,258 proposals in the $100,000 to $500,000 range.

We think that is a fairly substantial figure and we would like to see the threshold returned to $100,000.

Ms. **Gilleece**. Mr. Gordon indicates he would like to comment on that statement.

Senator **Exon**. Certainly.

Mr. **Gordon**. I don't disagree with the statistics as cited. I think it should be qualified that DCAA also said with respect to the $173 million that $140 million of that would have been detected through the normal negotiation process and disallowed from the contractors irrespective of the submission of certified cost on pricing data.

As a consequence the net impact is really more like $30 million. Now instead of devoting audit resources to contracts where we get a 20 to 1 return on each investment dollar from audit. we can devote our energies to contracts over $500,000 with a calculated return of $132 to $1 which is a substantially greater amount. It is a question of appropriate allocation of resources that we have available for audit.

I would also like to point out there is no case on record where DCAA has ever audited a contract under $500,000, for defective cost on pricing data. So, we are requiring a lot of paperwork in an area where the DCAA's audit facilities and resources are not adequate to even bother with the paper they are getting.

To us that doesn't make sense. What we are really advocating is not doing less, but doing more with the resources we have where there is a bigger payoff.

Thank you.

Mr. **Efros**. What we are talking about is a law which applies when there is no price competition. The $100,000 figure was established in 1962 when the law was first passed. Although prices have gone up since 1962, our feeling is that in the absence of competition that there ought to be a requirement for data.

Otherwise it would sort of be open season below $500,000 from our point of view. That is why we would keep the $100,000 figures as the threshold.

Senator **Exon**. This is something that caught my attention. I, for one, have been trying to get the threshold raised on Davis-Bacon. There is a lot of paperwork with Davis-Bacon, I know. Whether there is as much with this procurement process, I have no knowledge, but I would suspect that the Federal rules, regulations and red tape do require an awful lot of time and effort for all businesses.

Davis-Bacon I think started out at $2,500. Then it was raised to $5,000 20 years ago, and I believe it still remains there. I, for one, have always felt that if the $5,000 or $2,500 were figures that were reasonable that many years ago, that some higher figure just by a matter of reason would be more appropriate today.

Again I am just seeking to see how much thought has been given to this by you people who always deal with it. Is there a possibility that we should have something in between, not just $500,000 or $100,000? Is there anything in between?

What percentage of the contracts would be affected if we went back to $100,000? Would we double the total paperwork or would it be 10 percent more?

Do you have any studies or statistics on that?

Mr. **Gilroy**. We don't have statistics in that detail, Senator.

By the way, the Defense Contract Audit Agency agrees with GAO on this matter that the threshold should be brought back to $100,000 and so testified to that extent.

Mr. Gordon mentioned postaudit, that they just do not audit contracts of $500,000 and under. That is true in the postaudit. What we are talking about is preaward, the cost and pricing assistance that is provided to the contracting officer.

We do not see this as any extra heavy burden on the contractor, and again, as Mr. Efros said, there is no competition, this is a sole-source procurement we are talking about, and there is no competition. A firm is asked to submit cost on pricing data in support of its proposal which is accurate, current and complete.

We think the $100,000 is a reasonable figure and the returns reported by DCAA we think are substantial.

Senator **Exon**. Can you briefly outline what is the practical effect of having to certify? What more has to be done in this area?

Mr. **Gilroy**. This is what concerns us. We don't see that much more except that you are making your paperwork available to the auditors and you are certifying that it is accurate, current and complete.

I would suspect that you would also have this paperwork available if you were submitting a proposal for $400,000 on a Government project.

Senator **Exon**. Ms. Gilleece, could you give me your perspective on that? What more paperwork?

Ms. **Gilleece**. Let me go back to the question you asked before what is the effect if we went back to $100,000?

I mentioned before within the last 2 fiscal years we had more than 65,000 actions involving $100,000. Of those, 13.000 were over $500,000. Essentially what we have done is eliminate the need for the paperwork. I am not talking just about the original certified cost on pricing data, but the constant updating of that on 50,000 actions.

Let me comment on the question at hand and that deals with the situation of what further burdens are there on certified cost on pricing data? The contracting officer under $500,000 may ask for cost on pricing data. If, however, we are in a situation where the contracting officer has bought the same item five different times, he is cognizant of what that item should cost. He may choose not to ask for cost on pricing data.

Senator **Exon**. I understand that the Inspector General of the Department of Defense, though, has recommended that we do go back to the $100,000 figure.

Is that accurate?

Ms. **Gilleece**. Yes, sir. Let me have Mr. Gordon expand upon that since he was the witness at the committee when that information was provided to the Governmental Affairs Committee.

Let me also ask him to comment on your previous question concerning the paperwork situation and what further considerations are involved in taking it back to $100,000.

Senator **Exon**. That is fine with me, Mr. Chairman. I suppose my time has run out, though, and I do not wish to impose on the rest of the members who are here present. I think I have taken more than my time now. I would like to move on and give my colleagues an opportunity to ask questions.

Ms. GILLEECE. We will supply the answer for the record.

[The information follows:]

COST OR PRICING DATA

Senator EXON. Ms. Gilleece, could you give me your perspective on that? What more paperwork?

Ms. GILLEECE. In response to the question on paperwork, when certified cost or pricing data is required, the contractor must submit its proposal on a Standard Form DD–633, Department of Defense contract pricing proposal. The purpose of this Standard Form is to provide a vehicle whereby the offeror submits to the government a pricing proposal of estimated costs by contract line item with supporting information, adequately cross-referenced, suitable for detailed analysis. The form itself provides detailed instructions on the type and extent of data required. On the other hand, when certified cost or pricing data is not required and when less than complete cost analysis (eg., analysis of only specific factors) will provide a reasonable pricing result the contracting officer shall request only that data which he considers necessary to support the limited extent of the cost analysis required. Therefore, the $500,000 threshold would have eliminated the requirement for the submission of the DD Form 633 and the need for some of the detailed backup data in 51,914 cases during fiscal years 1981 and 1982.

Another area where there has been a substantial reduction in paperwork requirements and administrative effort is the need for the constant update by the contractors on the proposals under $500,000. The law requires that the data be current, accurate and complete as of the date of agreement on price. Thus the contractors must continually review and update the cost or pricing data prior to certifying that the data are current, accurate and complete. We have no way of quantifying the added costs of this process. However, it is apparent that a considerable amount of effort would be required for contractors to monitor the status of negotiations and update the cost or pricing data on thousands of price proposals if the threshold were reduced to $100,000.

Senator EXON. I understand the Inspector General of the Department of Defense, though, has recommended that we do go back to the $100,000 figure. Is that accurate?

Ms. GILLEECE. The Inspector General and the GAO have both recommended that the threshold for obtaining certified costs or pricing data be reduced from the current level of $500,000 to $100,000 which was the threshold established in 1962. They appear to be making this recommendation based on the negotiated reductions achieved as the result of pre-award reviews on contracts that had values of between $100,000 and $500,000. As we have previously testified, the DoD will still require contracting officers to perform a pre-award analysis on the proposals of less than $500,000. However, it is not necessary that certified cost or pricing data be required. The assumption that without certified cost or pricing data and mandatory audits by DCAA for proposals under $500,000, that the past negotiated savings on these types of procurements will be eliminated is not valid. Contracting officers will obtain audits and other field reviews in the cases where they believe it is necessary. In addition, they will use approved forward pricing rates for labor and overhead in determining the reasonableness of the proposed costs. Therefore, we do not anticipate any significant difference in the results of our negotiations of contracts under $500,000. We do, however, expect that we will see improvements in the negotiated contract prices for the procurements exceeding $500,000 because some DCAA and plant representative resources are now available for evaluating and negotiating these larger dollar value procurements.

Senator EXON. Thank you.

Chairman TOWER. At this point we would like to have all witnesses to whom questions are submitted for response in the record to respond by Monday, June 13, because we will proceed to mark up following that date.

Senator Cohen?

Senator Cohen. Thank you, Mr. Chairman.

I would like to begin where Ms. Gilleece left off when she indicated that the House version contains most of the recommended changes by DOD.

I submit to you it is perhaps more than simply a matter of coincidence, since Ms. Gilleece drafted the House version of the bill, while she worked for Congressman Stratton before going to DOD. I think there is something about pride of authorship here that may be important to consider.

Prior to going to questions, Mr. Chairman, I would like to give a little history.

Last year my staff met with DOD procurement representatives and counsels on a number of occasions to discuss S. 2127, which was the predecessor bill to S. 338 and subsequent to those meetings with DOD officials, I amended the bill to take into account many of the objections and recommendations of DOD.

As amended, I reintroduced that bill in this Congress and Senator Roth, who is chairman of the Governmental Affairs Committee, requested written comments on S. 338 from the agencies including the Defense Department. That request went out in February of this year.

I finally received DOD's comments last evening and, frankly, I am dismayed about the pages and pages of recommendations. Not only are new concerns being raised, but DOD has recommended changes to language which was included verbatim at its request last year.

I would also point out for the record, Mr. Chairman, I have a copy of the Governmental Affairs hearing that was held on June 29, 1982, to consider S. 2127, at which time I asked William Long, Ms. Gilleece's predecessor, what his opinions were of the legislation. I asked Mr. Long, "How many drafting problems do you see? How many of those questions do you have on drafting?"

> **Mr. Long.** I think there may be a half dozen or so of greater or lesser significance. Some perhaps easily cleared up.

I have heard pages of recommended changes here today.

The third point I would like to make is that there was reference made to Mr. Sowle's letter to Senator Roth. Unless there are two letters, I would like to read from the letter that I have. Referring to Senator Roth, it says:

> Dear Mr. Chairman. In reference to your comments on the Competition in Contracting Act, we support S. 338 as revised by Senator Cohen's amendments as set forth in the enclosure.
>
> You also requested our assessment of the possible paperwork and regulatory burdens which might result from passage of S. 338. The bill would have only a slight initial regulatory or paperwork impact on Government contracts. Section 102 of the bill requires contractors to submit cost on pricing data in certain circumstances.
>
> Although the requirement is not contained now in the Federal Property and Administrative Service Act, it is a part of the Armed Services Procurement Act. Most Government contractors do business with both civilian agencies and the Department of Defense and would not have to adjust their procedures in bookkeeping to comply.
>
> S. 388 would also have a minor impact on the paperwork and regulatory burdens of the agencies. Most of the publication and recordkeeping provisions are already required by the Defense Acquisition Regulations and the Federal Procurement Regulations.
>
> The changes in competitive and noncompetitive procedures requirements to include special simplified procedures and forms for small purchases in agency

procurement regulations and notice of publication of requirements would necessitate issuance of new agency regulations initially, but the increase in the regulatory burden would be minimal.

Sincerely, Donald E. Sowle, Administrator.

Senator COHEN. I would like to submit that for the record, Mr. Chairman, because apparently Mr. Sowle comes out in support of S. 338. There is no indication in the letter I have that he would want to see this legislation substantially altered or killed.

Finally, I have a number of letters from organizations in support of S. 338, which I would like to submit for the record.

Lastly, I would like to submit a copy of a report of the Congressional Budget Office that indicates S. 338, as reported by the Governmental Affairs Committee, could save up to $2 billion a year.

[For information submitted for the hearing record by Senator Cohen, see p. 162.]

Now I would like to turn to some questions, if I might, Mr. Chairman.

Ms. Gilleece, you recommend on page 4 of your statement that this bill be amended to add four more exceptions to competition, including a catchall exception where the agency has determined that it is necessary to award contracts on other than a competitive basis. Authority to exercise that exception, moreover, is delegated to relatively low levels.

In my judgment, the inclusion of that catchall provision would severely weaken the objective of S. 338. The exception is similar to the "competition is impracticable" exception currently in the law that was used to justify nearly 58 percent of the sole-source contracts awarded last year.

The GAO recommends that a tightly worded seventh exception be added. In addition, Professor Cibinic recommends that S. 338 be amended to include a waiver provision for unanticipated circumstances which do not fall within one of the six exceptions. Professor Cibinic's waiver procedure would be controlled at the secretarial level with no delegation and would require an annual report by the agency to Congress on the waivers exercised.

I am not particularly concerned one way or the other whether GAO's or Professor Cibinic's recommendations are adopted, but I think they are far more preferable than DOD's recommended exception which allows the delegation of decisionmaking authority to a lower level.

The second issue I want to raise involves the exception you recommend which would allow the award of a noncompetitive contract based on an unsolicited proposal that demonstrates a unique and innovative concept.

One of the difficulties I have is distinguishing between unsolicited proposals and "solicited unsolicited" proposals, which in fact are suggested by the agency heads particularly at the end of the fiscal year when time is running out and agencies seek to deplete their budgets. You attempt to resolve this particular problem by excluding proposals which result from informal agency requests.

The problem I have with your approach is how you determine which proposals result from informal agency requests, considering that most requests are oral and no written records are kept.

Second, the definition standards to determine whether an agency can use sole-source procurement for unsolicited proposals are inadequate.

According to Professor Cibinic, unique and innovative are terms that are not well understood or defined legal terms. I would like to know what you mean by unique and innovative.

Ms. GILLEECE. Senator, as to your first point, regarding the exception unforeseen circumstances, and I might quote from my prepared statement on page 13:

> Adequate safeguards would be included to provide that the authority to make the required determination cannot be delegated below the level of assistant secretary or equivalent.

Senator COHEN. That is too low.

Ms. GILLEECE. Regarding your second point on unsolicited proposals, my master thesis which was prepared for Professors Cibinic and Nash was entitled "Unsolicited Proposals" and contains a section specifically dealing with the definition of unique data and proprietary data.

Senator COHEN. You are the one who testified that you have to be very careful about making these changes because of the body of law that has grown up based on the present language.

Are you suggesting there is an adequate body of law that defines the terms innovative and unique?

Ms. GILLEECE. I have read 600 GAO decisions that dealt with those two issues.

Senator COHEN. Those are to be incorporated about reference then?

Ms. GILLEECE. I am suggesting that unique cannot specifically be defined, but can in fact be determined from the already existing background that we have.

In other words, what we are dealing with is what the Navy, Army, or Air Force may already have. That data would not be unique. Data which is not already within the purview of several knowledge or where concepts are put together in an unusual manner may be unique data.

Senator COHEN. Do you agree with GAO's conclusion that the Department loses many competitive procurement opportunities? That was a GAO study back in July 1981.

Ms. GILLEECE. Senator Cohen, the Department as I suggested to you, had clearly in the past focused on competition. It does now and will continue to do so. If there are specific times when we have missed opportunities for competition, we can only acknowledge that we are not perfect, nor is the system. I believe we are 99 and 44/100ths percent pure.

Senator COHEN. I won't get into the definition of purity.

Chairman TOWER. Ivory soap is.

Senator COHEN. It also dries the skin, Mr. Chairman.

May I have a copy of your letter where you suggested Mr. Sowle was opposed to legislation in this field?

Ms. GILLEECE. Senator, if I misled you, I did not mean to. I was only referencing that letter in the area of advocates for competition. On the issue of advocate for competition he has an attachment to that letter concerning title III and his last sentence is:

"Therefore we do not feel there is a need for legislation in this area."

Senator COHEN. Let me focus on this issue for a moment. You say you already have an advocate for competition in the DOD procurement executive, so why put it in the law.

My question is why not? What harm is done by incorporating in a statute dealing with reform of your procurement practices the requirement to have an advocate for promoting in competition in contracting.

It provides leeway for promoting changes that affect the conduct of that advocate. Why would you oppose having something in a statue that you currently do in practice?

Ms. GILLEECE. In my view the regulatory process allows us much more flexibility. As you know and we know, it is very difficult to change a law once it becomes law. We will continue to have advocates for competition and we will continue to have them by service and by agency. However, what the Army may need the Air Force may not need. What the Air Force may need the Navy may not need.

Senator COHEN. I am not sure I understand what the objection is. I recognize there are different needs.

What difference does it make if you have an advocate that promotes competition whether it is the Army, Navy or Air Force, if you have an advocate promoting competition, I don't understand what difference it makes that you have different needs.

Ms. GILLEECE. We are suggesting that the flexibility of being able to change the regulations more quickly than being able to change the law would make the regulatory process more dynamic and more responsive.

Senator COHEN. The problem has been that there has been too much flexibility in the past—too much in the way of allowing sole-source contracts. What we are trying to do is correct that.

You have 54 percent of your contracts awarded by way of sole source. Perhaps you can justify it. I do not think so. I point to a GAO review of defense contracts over the past couple years showing numerous noncompetitive contracts based on unsolicited proposals that should have been awarded competitively.

In fiscal 1979 the Defense Nuclear Agency awarded 781 of its 795 new contracts noncompetitively, the vast majority of which were based on unsolicited proposals. GAO found that many of these contracts were signed after work had already been started, thus making it difficult for the DNA contracting officer to solicit any additional bids.

In a 1980 review of DOD management support service contracts, GAO found 40 percent or 256 randomly selected contracts reviewed were based on unsolicited proposals which were often used, No. 1, to subvert the competitive process; No. 2, to encourage work that was not relevant to DOD's mission needs and responsibilities; and No. 3, to perform work that was not truly unique or innovative.

In a June 3 letter to me, GAO stated:

> We do not believe that a specific exemption to the requirement to use competitive procedures should be added for unsolicited proposals . . . such an exception would provide an easy way to avoid use of the competitive process.

I won't drag this out any further. I will submit it for the record. This is another example where there has been a lot of—too much—

flexibility. I think the taxpayers have been done a disservice as a result of that. It is not that we are trying to be so restrictive that we rigidify the system so it cannot operate.

I think the emphasis has to be put back on competition to make it more restrictive and less easy to go by way of noncompetitive procedures.

Chairman TOWER. Mr. Cohen, your time is up. Senator Bingaman?

Senator BINGAMAN. Thank you, Mr. Chairman.

Mr. Gilroy, have you any information about any of the trends that are taking place with regard to what percent of the contracting that is being done by DOD is done competitively versus what is not, whether it is increasing, decreasing, the same thing with sealed bids?

Do you have any information on those lines?

Mr. GILROY. We can provide that for the record. We have compiled statistics. I do not have them with me, but we will provide them for the record.

[The information follows:]

Dollar Value of DOD Procurements
by Type of Competition for FY 1980-1982

DOD Prime Contract Awards Categories	FY 1980 $ value (000)	FY 1980 Percent	FY 1981 $ value (000)	FY 1981 Percent	FY 1982 $ value (000)	FY 1982 Percent
Total a/	81,741,958		103,166,069		122,766,061	
Intragovernmental	10,099,377		- 9,754,906		-12,702,889	
Total (Except Intragovernmental)	71,642,581	100	93,411,163	100	110,063,172	100
Competitive	23,553,808	32.9	34,226,002	36.6	40,585,659	36.9
Price	17,853,034	24.9	27,766,615	29.7	32,411,081	29.4
Design	5,700,774	8.0	6,459,387	6.9	8,174,578	7.4
Noncompetitive b/	48,088,773	67.1	59,185,161	63.4	69,477,513	63.1

a/excludes civil function of the U.S. Army Corps of Engineers

b/includes 8(a) contracts, tariff regulated utilities, contracts with educational and nonprofit institutions and brand name items for commissory resale.

Senator BINGAMAN. Do you have any recollection as to whether we have an increase or decrease taking place in the number of contracts that are competitively handled?

Mr. GILROY. Mr. Wolin recently looked at this.

Mr. WOLIN. We compared 1982 to 1981. Rather than looking at numbers of contracts, we looked at dollars. I think there was a slight increase in competitive dollars in 1982 over the prior year 1981.

Senator BINGAMAN. I have been told that the percent of procurements handled by sealed bid is something around 6 percent.

Mr. WOLIN. That is in terms of dollars, not in numbers of contracts. It is much greater in numbers of contracts. It is 6 to 8 percent of the dollars, somewhere in that realm.

Senator BINGAMAN. I would ask the Department of Defense, do you have any contrary information?

Ms. GILLEECE. There was a $6 billion increase in the dollars awarded competitively from fiscal year 1981 to fiscal year 1982.

We often get involved in the statistics game. Let me share with you some of the statistics we are dealing with here.

Under formally advertised contracts, which S. 338 would address as sealed bids, in this fiscal year 1982, essentially what we are dealing with in terms of billions of dollars is $75 billion.

However, if you add to that other price competition as well as design and technical competition, you have a subtotal within the Department of Defense of $42.2 billion. In addition follow-ons to competition, follow-ons to design or technical competition and awards at catalog pricing or market prices total $28.2 billion and then if you take——

Senator BINGAMAN. Why don't we just put this in the record, Mr. Chairman? My 10 minutes are running here.

[The information follows:]

EXTENT OF COMPETITION IN DOD

Summary: An additional $6.2 billion was competed in fiscal year 1982 over 1981. The competitive rate rose to 41.1 percent in fiscal year 1982 versus 40.7 percent in fiscal year 1981 (contract value). Follow-on contract awards increased $5.5 billion in fiscal year 1982 over fiscal year 1981, and the percentage of follow-on awards rose to 25.6 percent versus 23.6 percent in fiscal year 1981 (contract value). The number of procurement actions placed competitively rose to 52.6 percent in fiscal year 1982 as compared to 48.1 percent in fiscal year 1981.

Ms. GILLEECE. If I might by way of conclusion, what we are dealing with as other noncompetitive is $32 billion.

Senator BINGAMAN. Is it accurate that about 6 percent of DOD's procurement is handled by sealed bids? Is that accurate?

Ms. GILLEECE. $7.5 billion or 7.3 percent was awarded through sealed bids, this is one method of competitive procurement within the Department.

Senator BINGAMAN. Let me ask you, Ms. Gilleece, about the exceptions that you propose to add here.

What is my remedy as a company that wants to bid on a contract when the Department of Defense goes ahead and awards it without any competition or without allowing my participation in that?

Ms. GILLEECE. There are legal remedies available to you in addition to discussing the issue with the contracting officer or his superiors within the Department. The Comptroller General would certainly consider the issue if you had a matter which would be considered under a protest.

Senator BINGAMAN. But my remedy would then be to prove to a court it did not fall within one of the exceptions under which the law permitted DOD to handle things noncompetitively; is that right?

Ms. GILLEECE. You don't have to go as far as the court, but that is one of the remedies.

Senator BINGAMAN. That would be my ultimate remedy to go to the court?

Ms. GILLEECE. Yes.

Senator **Bingaman**. If your proposed exception number nine were added into the bill as drawn and the standard was that the head of the agency determined it was necessary to award the contract on other than a competitive basis and that it is not inconsistent with the public interest to do so, how would I prove that to a court?

How would I prove that in my opinion it was inconsistent with the public interest?

Ms. **Gilleece**. I recognize it is very difficult to philosophize about a situation we really are not defining, discretion of the contracting officer: the final decision by the assistant secretary or higher, as to what the law may be. These matters would be examined by the GAO, the court or the board and it would be up to that particular body to determine whether it was a proper exercise of authority.

Senator **Bingaman**. I guess my question is: Aren't you suggesting that we put such a loose standard in that there is no way that anybody can ever review it?

Ms. **Gilleece**. No, sir. I am suggesting that because of the unforeseen need that the Department may have, remembering its ultimate responsibility is to be able to wage war, we may not know what may happen during that time. We may also not know what may come up in those 13 million contracting actions per year. The decision may be made by a contracting officer that such is the need of the Department, but it requires a high level review. We have put safeguards in as our recommendation such that what you are suggesting would not occur.

Senator **Bingaman**. But you don't think the suggestion that Senator Cohen made of possible waiver that your predecessor has suggested solves the problem of allowing sufficient flexibility?

My concern, which I guess is shared by many, is that the exceptions you are recommending are such that you can drive a Mack truck through them, as they say, and really there is no way for the Congress or anyone else to hold the Department accountable for going with competitive bidding if we add these exceptions to the bill.

What is your response?

Ms. **Gilleece**. Mr. Trosch indicated to me that he feels he can give a legal definition of what we are dealing with here.

Mr. **Trosch**. The exceptions that we are adding really are fairly narrow with the exception of the ninth one that you pointed to. It is true that it is very broad in nature. It is designed because we are not today knowledgeable enough to foresee all of the possibilities that may occur in the future that would not be encompassed within the other very specifically defined exceptions.

You asked what standards somebody would have to have to prove whether or not we were within the terms of the exception, itself. We are not proposing that it be delegated to a low level within the system, but to a level that would be given a fair amount of respect such as a senior administration official.

Would there be standards applied? There are traditionally standards applied in the sort of situation such as whether or not it was entered into on the basis of fraud, or that it was arbitrary or capricious.

Senator **Bingaman**. Assuming Secretary Weinberger makes the decision, you are suggesting that a person who wanted to bid and was not permitted to bid would have to take him into court and prove that he committed fraud in order to demonstrate that you violated this act.

Mr. Trosch. I am suggesting that if it were determined that it was necessary to award the contract on other than a competitive bidding basis, it would be necessary to contest the Secretary's decision in a legal action where it would have to be shown that the decision was based on fraud or at arbitrary or capricious action.

But I submit to you that at the sort of levels we are talking about it is not inconsistent with the procurement statutes that we have had up until now or this one. Those sorts of determinations are made at appropriate levels within the Department.

Senator Bingaman. There is a comparable loophole in the present law, as I understand it, which essentially gives blanket discretion to the Secretary, to the Department?

Mr. Trosch. No, I don't believe so. There is a broad exception in the present law, 10 USC 2304(a) (10). Let me read it specifically:

> There may be negotiation when the purchase or contract is for property or services for which it is impracticable to obtain competition.

Senator Bingaman. Have there ever been court cases indicating that the Department violated the act by permitting noncompetitive contracting under that provision? Has there ever been a court decision finding that?

Mr. Trosch. I am sure that there have been many decisions in the bid protest process with the GAO in which they concluded that there was question as to the basis on which the contracting officer made the determination.

Senator Bingaman. I would like to know if GAO would want to respond to that same question.

Mr. Gilroy. I defer to our counsel.

Mr. Efros. We do get a number of protests on the use of the exception in 10 U.S.C. 2304(a) (10) to the requirement for formal advertising as justification for sole-source procurement. Under existing law, findings under 10 U.S.C. are final; nevertheless if we agree with the protester that the determination reached by the agency based on those was unusable, we could recommend to the agency [DOD] that they terminate the contract. If we catch it before award, then, of course, we can do something about it.

Senator Bingaman. I am interested in whether there was any court decision that ever overturned a determination by DOD that it was impracticable?

Mr. Efros. I do know of an action involving the Navy in the Federal District Court. I think it was the *Aero* case, Judge Oberdorfer, where essentially he sustained a complaint about a sole-source to Lockheed. That is the only one I know of offhand.

Senator Bingaman. Thank you, Mr. Chairman.

Chairman Tower. Senator Cohen, do you have some additional questions?

Senator Cohen. I have just a few. I realize you have to leave.

Chairman Tower. Senator Cohen, I will surrender the Chair to you.

Senator Cohen [presiding]. Senator Bingaman raised a couple of questions about whether those statistics are right. I frankly don't know. I don't know whether DOD's are right or GAO's are right. I don't know how they are always calculated.

A few months ago, the Governmental Affairs Committee held a hearing on DOD management. We sat and listened to the testimony dealing with selected acquisition reports and you may recall DOD made a presentation that was reported widely in the Wall Street Journal about significant reductions in cost growth as a result of new policies being implemented. Upon close examination, however, the committee found that what had happened is that there was a reclassification of some of the older systems and they called them new systems.

Trident submarines, for one, were taken out of the old category and put in the new category of weapon systems. There was little in the way of reduction in cost growth, but rather reclassification of weapon systems which appeared to reduce cost growth.

Second, I would submit for the record something which antedates, I suppose, many of the people who are here this morning. This it is a March 8, 1982, letter report from GAO to Caspar Weinberger, entitled: "Report of Competition in Defense Procurement, Recent Changes are Misleading."

The report says that considerable liberty has been taken in the presentation of competition in DOD procurement, that during testimony of several witnesses three procurement categories classified by DOD as noncompetitive were presented as competitive and they shifted $9.5 billion from noncompetitive to competitive procurement.

I see a shaking of heads at the table. There may be legitimate disagreement on GAO's conclusions. That is something that at least our staff ought to have an opportunity to examine.

I would submit that entire document for the record so that our staff can make an examination and hopefully try to come up with a correct assessment.

[The information follows:]

UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

PROCUREMENT, LOGISTICS,
AND READINESS DIVISION

B-205720

MARCH 8, 1982

The Honorable Caspar W. Weinberger
The Secretary of Defense

Attention: Director, GAO Affairs

Dear Mr. Secretary:

Subject: Reporting Competition in Defense Procurements--
Recent Changes Are Misleading (PLRD-82-45)

Determining the real extent of competition in Department of Defense (DOD) procurements is becoming *increasingly* difficult. In the past, DOD experienced declines in competitive procurements that caused increased congressional concern. Amid congressional inquiries about the extent of competition, DOD officials portrayed competitive rates for the first half of fiscal year 1981, ranging from a high of 69 percent in testimony before the Senate Committee on Armed Services to a low of 45 precent in their procurement statistics.

DOD procurement statistics were also revised to include certain highly competitive nonmilitary awards and to exclude certain noncompetitive military awards. In our opinion, DOD's presentation of, and changes to, its statistics could decrease the credibility of the statistics and could even lead to a real decline in competition. Furthermore, we realize DOD has undertaken management initiatives to increase competition and are concerned that changes in reporting competitive and noncompetitive statistics will distort the historical base and make it difficult to measure improvements in competitive buying.

OBJECTIVES, SCOPE, AND METHODOLOGY

This review was undertaken because of ongoing congressional concern about competition and because of the lack of consistency in reported amounts of competitive DOD contracts.

We reviewed the various reports on DOD competitive contracts to determine where differences occurred. We isolated recent changes to evaluate their impact on reported competition and discussed the rationale for these changes with DOD officials.

(942083)

INTERPRETATIONS AND CHANGES CAUSE CONFUSION OVER COMPETITIVE STATISTICS

Considerable liberty has been taken in the presentation of competition in DOD procurement. During testimony, three procurement categories classified by DOD as noncompetitive were presented as competitive. This shifted $9.5 billion from DOD's noncompetitive to its competitive procurements.

The Congressional Record of June 24, 1981 (p. H 3292), reported that competition in DOD procurement in the first half of fiscal year 1981 had reached 69 percent of total procurement. DOD officials, likewise, testified before the Senate Committee on Armed Services on July 28, 1981, that 69 percent of DOD purchases were competitive in the first half of fiscal year 1981 when DOD's statistics indicated 45 percent were competitive.

In addition, two revisions have been made that alter the way the statistics are compiled. First, certain noncompetitive categories of procurement have been excluded from DOD procurement reports. This has deleted over $3.3 billion from DOD's previously reported noncompetitive procurements. Second, for the first time, civil works programs have been included in DOD procurement reports. This has added over $1.5 billion to reported competition. These two revisions inflated DOD's competition to the reported 45 percent. Our analysis shows that, when using DOD's historical statistical classifications, competition in the first half of fiscal year 1981 was 41 percent. The table on the following page shows the impact of DOD's actions versus historical statistical classifications for the first half of fiscal year 1981.

DOD Procurement in First Half of Fiscal Year 1981

	Historical statistical classifications	Revised statistical classifications	Revised statistical classifications with altered presentation
		(percent)	
Competitive			
Formal advertising	5.8	7.6	7.6
Price negotiated	25.4	27.5	27.5
Total price	31.2	35.1	35.1
Design	9.5	10.1	10.1
Total price and design	40.7	45.2	45.2
Follow-on after price	-	-	1.6
Follow-on after design	-	-	19.0
Catalog or market	-	-	2.8
Total competitive	40.7	a/45.2	a/68.6
Noncompetitive			
Follow-on after price	1.5	1.6	-
Follow-on after design	17.9	19.0	-
Catalog or market	2.7	2.8	-
Other noncompetitive	37.2	31.3	31.3
Total noncompetitive	59.3	a/57.7	a/31.3

a/Does not add due to rounding.

The new classifications, as discussed below, could mislead the Congress and the public by inflating the competitive statistics and could result in relaxing the pressures to obtain greater competition.

INTERPRETATIONS CAUSE CONFUSION

Three categories designated noncompetitive were presented in testimony as competitive. These include

--follow-on contracts where the original award was based on price competition,

--follow-on contracts where the original award was based on design competition, and

--sole-source contracts to a contractor at a catalog or market price for commodities sold in substantial quantities to the public.

By presenting these contracts as competitive, DOD increased the competitive/noncompetitive ratio by 24 percent.

In our opinion, the assumption that follow-ons should be considered competitive if the original award is competitive is questionable and can contribute to a decline in competition. DOD uses the classification "follow-on" to identify certain noncompetitive contracts where a previous award, made competitively, creates a situation which necessitates that subsequent contracts be awarded to the same contractor. We believe that being tied to one contractor when many exist is no more indicative of a competitive procurement than a situation where there is only one vendor. Classifying follow-on contracts as competitive eliminates any distinction between subsequent noncompetitive and competitive awards. This could remove the incentive for procurement officers to compete these procurements wherever feasible and thereby contribute to a decline in competition.

We recognize that some noncompetitive follow-ons for procurements, such as major weapon systems, are inevitable. However, when such contracts cannot be competed for sound reasons, we suggest that they be classified "Noncompetition--No Potential," as discussed below.

As in the case of follow-ons, the assumption that catalog or market price contracts assure the Government the best competitive price is open to question. While the market in certain instances may set prices through competition, other forms of market pricing involve monopolies, oligopolies, and cartels where prices are not established through competition. For example, the actions of the OPEC Oil Cartel were highly publicized as attempts to control the supply and prices of oil. In the first half of fiscal year 1981, noncompetitive procurements of petroleum products accounted for over 85 percent of the dollar expenditures in the catalog/market price category. In addition, we believe classifying catalog or market price contracts as competitive may contribute to a decline in competition if contracting officers believe they do not have to obtain competition on items that may be justified as catalog or market price.

CHANGES MADE TO STATISTICS

Certain noncompetitive procurement categories were excluded from the procurement data base. These categories include contracts which were awarded

--for brand name items for commissary resale,

--to educational and nonprofit institutions,

- --to monopolies for utilities where the price negotiated is based on rates set by law or regulation, and
- --to minority contractors pursuant to section 8(a) of the Small Business Act (15 U.S.C. 637 (a)).

DOD has excluded these contracts from the statistical base because it believes they are not susceptible to competition. The main problem with this change is that it incorrectly implies that there is no opportunity to obtain competition on any of these procurements. For example, while the contracts to educational institutions are predominantly noncompetitive, more than $25 million in competitive awards were made to educational institutions in fiscal year 1979. If the extent of competition for contracts to educational institutions is no longer reported, contracting officers and program officials may no longer be encouraged to obtain competition where it is available and useful. This could result in a decline in competition.

The following table shows the enhancement of the competitive/noncompetitive ratio resulting simply from excluding noncompetitive contracts.

Effect of Excluding Certain Non-Competitive Contracts from the Data Base in First Half of Fiscal Year 1981

	Former practice includes these contracts	Effect of excluding these contracts
	------------------(percent)	----------------
Competitive		
Formal advertising	7.1	7.6
Price	25.4	27.5
Design	9.4	10.1
Total competitive	41.9	45.2
Noncompetitive		
Follow-on price	1.5	1.6
Follow-on design	17.5	19.0
Catalog or market	2.6	2.8
Other noncompetitive	36.6	31.3
Total noncompetitive	58.2	54.7

As can be seen from the table, excluding certain noncompetitive contracts simply creates the illusion of improving competition.

When there is only one contractor available, we suggest including the contract in the statistics but using the classification "Noncompetitive--No Potential."

In 1980 DOD began including in its competitive statistics 1/ nonmilitary contracts for the civilian functions 2/ of the Army Corps of Engineers. It is our understanding that these contracts are not funded through DOD appropriations, nor are they awarded through regular DOD procurement offices. Instead, these contracts are funded directly to the civilian function, as authorized under the Rivers and Harbors Act, and are awarded through the civilian function's procurement office.

Contracts for civilian functions are highly competitive. For example, in fiscal year 1980, 86 percent of the contracts for civil functions were competitive, equal to $1.5 billion of competitive awards. In the first half of fiscal year 1981, competition on these contracts reached 89 percent. A comparison of fiscal year 1981 competitive statistics, including and excluding contracts for the civil functions, demonstrates the impact of including these contracts for the first time in DOD's statistics.

1/Concurrent with the inclusion of contracts for civil functions, DOD changed the title of its statistical report from "Military Prime Contract Awards" in fiscal 1979 to "Prime Contract Awards" in fiscal 1980, acknowledging the fact that the statistics no longer reflect only military awards.

2/Includes among other programs, the Civil Works Program which involves major dams, locks, levees, and other structures.

Effect of Including Civil Functions on Extent of Competition in First Half of Fiscal Year 1981

Competitive	Civil functions only	DOD including civil functions	DOD excluding civil functions
	(percent)		
Formal advertising	63.8	7.6	6.3
Price	23.4	27.5	27.6
Design	1.6	10.1	10.3
Total competitive	a/88.8	a/45.2	a/44.2
Noncompetitive			
Follow-on price	0.2	1.6	1.6
Follow-on design	0.1	19.0	19.4
Catalog or market	-	2.8	2.9
Other noncompetitive	10.8	31.3	31.8
Total noncompetitive	a/11.1	a/54.7	a/55.7

a/Does not add due to rounding.

By including contracts for civil functions, DOD reported an increase in formal advertising from 6.3 percent to 7.6 percent during the first half of 1981 and an overall increase in competition of 1 percent during this period. If such contracts are to be included in the future, we believe there should be a reconciliation with past data to show the year-to-year trend for the totals with and without civil functions.

DOD BELIEVES SOME CHANGE IS NEEDED TO BETTER PRESENT COMPETITION

It appears that DOD's recent changes in the presentation of its procurement statistics is an attempt to highlight areas where there is no potential to obtain competition. According to DOD officials, DOD's historical reporting of competition does not adequately present this data. They believe that a significant portion of DOD's procurements have no competitive potential. While we agree that it is impractical to obtain competition on many contracts, we do not believe, for the reasons discussed above, that DOD's recent changes to reporting competition are appropriate without further adjustment. In our opinion, a better way to identify contracts with no competitive potential would be to break down the noncompetitive category into "Noncompetitive--Potential" and "Noncompetitive--No Potential."

Noncompetitive--potential

Many of the types of contracts awarded noncompetitively offer the potential for competition. For example, contracts awarded under section 8A of the Small Business Act may have competitive potential, but because they are intended to assist disadvantaged businesses they are not competed. Such contracts could be displayed under a "Noncompetitive--Potential" subcategory without distorting DOD's statistics or weakening DOD's incentive to obtain competition.

This subcategory would include contracts which are awarded

--pursuant to section 8A of the Small Business Act;

--under extenuating circumstances, such as time constraints or to maintain an industrial base; and

--in the absence of a data package sufficient to obtain competition.

Noncompetitive--no potential

Similarly, many of the types of contracts awarded noncompetitively offer no potential for competition. These contracts could be displayed under a "Noncompetitive--No Potential" subcategory without distorting statistics. This subcategory would include:

--Follow-on contracts to a weapon producer who is locked in by extensive investment in plans and facilities or similar circumstances which make it impracticable to obtain competition. The impracticability of obtaining competition, however, should be fully supportable.

--Contracts to vendors who are the only source.

--Other contracts, such as certain utilities, where the price is set by law or regulation.

With these new subcategories, DOD could then better identify areas where there is no potential to obtain competition without distorting historical trends or discouraging competition.

CONCLUSIONS

In our opinion, the fact that DOD is obtaining 41 percent of the procurement dollars in competitive contracts, based on past statistical classifications, should not be considered either favorable or unfavorable. To properly evaluate DOD's efforts to obtain competition, procurements must be put into the context of what levels of competition are possible.

AGENCY COMMENTS AND OUR EVALUATION

DOD officials concurred with our conclusion that follow-on and catalog or market price contracts are noncompetitive. They emphasized that these contracts are reported as noncompetitive and that DOD officials' portrayal of these categories "as based on competition" was not intended to realine the statistics but rather to distinquish them from other noncompetitive contracts. They disagreed with the report's conclusions that certain noncompetitive contracts should remain in the data base and that other nonmilitary contracts should not have been included in the data base.

Regarding the removal of contracts for utilities, brand name items for commissary resale, services from educational and nonprofit institutions, and goods or services from minority contractors under the 8A program, DOD believes that no opportunity exists for competition in these areas and therefore these contracts should be removed from the data base. In addition, the inclusion of nonmilitary contracts for the civilian functions of the Army Corps of Engineers was based on the fact that such contracts are awarded by the Corps of Engineers' personnel under the Defense Acquisition Regulation.

We believe DOD's position that contracts should be removed from the data base because they offer no opportunity for competition is inconsistent with the reporting of whether competition was or was not obtained. This position also incorrectly implies that all of the noncompetitive contracts left in the data base had the opportunity to get competition. Furthermore, removing contracts from the data base because they do not offer the potential for competition will ultimately remove many procurements for major weapon systems and result in a highly competitive data base which represents only a fraction of the annual contracts awarded.

We also believe DOD's position that nonmilitary contracts be included if they involve military personnel and the Defense Acquisition Regulation will distort the data base. The intention of the statistics is to portray DOD expenditures. Consequently, by including nonmilitary contracts, the focus on examining the extent of competition on military awards is lost.

We believe the annual Prime Contract Awards publication is the primary source of information for DOD procurements. It is therefore imperative that these statistics contain all of the prime contracts DOD awards and be limited to only military procurements.

DOD disagreed with our recommendation to maintain the historical presentation of its statistics. It believes that while frequent changes to the reporting of competition would be unwise, the principle of consistency should not preclude warranted changes.

Additionally, DOD believes our recommendation to further break down the noncompetitive category would not satisfy its objective of a better presentation of the data.

We support warranted changes and suggest procedures in our report that will allow DOD to portray contracts where competition is not feasible without distorting the data base. We want to emphasize that we are not opposed to changes that will improve the understanding of the statistics. However, we believe changes similar to those recently implemented by DOD can only lead to confusion.

RECOMMENDATIONS

We recommend that the Secretary of Defense:

--Maintain longstanding historical classifications of military procurement contract data for purposes of displaying competitive versus noncompetitive trends.

--Include in the noncompetitive category, new subcategories entitled "Noncompetitive--No Potential" and "Noncompetitive--Potential," as described above.

--Show procurements for civilian functions as an additional calculation after displaying the traditional and historical statistical classifications.

- - - -

As you know, section 236 of the Legislative Reorganization Act of 1970 requires the head of a Federal agency to submit a written statement on actions taken on our recommendations to the House Committee on Government Operations and the Senate Committee on Governmental Affairs not later than 60 days after the date of the report and to the House and Senate Committees on Appropriations with the agency's first request for appropriations made more than 60 days after the date of the report. We are sending copies of this report to the Chairmen, Senate and House Committees on Armed Services and on Small Business.

Sincerely yours,

Donald J. Horan

Donald J. Horan
Director

Senator COHEN. Ms. Gilleece, I would like to turn to the issue of procurement policymaking. One of the problems we have here is that everything takes so long to change. I recently chaired a hearing in the Governmental Affairs Committee dealing with the reauthorization of the Office of Federal Procurement Policy. I know there is a reasonable disagreement within the Department of Defense as to whether or not we should reauthorize OFPP, restore its regulatory powers and give it other responsibilities.

There has been an attempt to achieve greater uniformity in procurement policy on the part of this Government since the late 1960's when Congress established the Commission on Government Procurement. This Commission, consisting of Senator Jackson and others, was formed to recommend changes to improve our procurement practices.

What we are trying to achieve here is consistent with what you are wanting. You are right, what we want to do is procure the best systems for our fighting people who are out there in the event they have to go to war. I don't know anybody who wants to get any less than the best equipment. Part of the difficulty is that we are seeing more and more dollars going for fewer and fewer systems.

You will recall Norm Augustine wrote a book called "Augustine's Laws" with reference to a higher order of things. He said that one aircraft would consume the entire defense budget by the year 2020, if the present figures are extrapolated on a linear line. I don't think that is going to be the case.

Nevertheless, Augustine points out the difficulty we have when you take an F–18, you name the weapon system, and go from a $14 or $16 billion program to a $38 or $41 billion program. People start saying we can't afford it. What we are looking for in the country is a consensus for necessary defense spending.

This effort really is designed for the same thing you want. How do we reform the system in a way that we are satisfied that we are getting the best we can for the amount of money we are spending? I don't profess to have any special expertise. I am just a generalist trying to figure out an area about which most people's eyes glaze over.

Believe me, there is very little incentive on Capitol Hill to focus on this. It is terribly tedious, very technical. You people are the experts; we are not. So we try to bring to bear whatever talent we have and ask, can't we change this?

If you tell us that this is the wrong change and it only creates more problems than it attempts to solve, then we ought to listen. I am not trying to dictate or shove anything down anybody's throat. But how do we achieve the same goal?

That is the spirit in which I have tried to offer this legislation. I indicated in my opening remarks I think S. 338 can be amended in some ways. I want to make sure whatever amendments are offered and accepted don't serve ultimately to bring the rock back down the hill 10 years from now and we end up back where we started.

I have no way of knowing what it will produce in 10 years. We depend on you. Hopefully this competition between intelligent experts here is good. That is what this country was founded upon: competition, ideas and intelligence. In trying to resolve this conflict, hopefully what will emerge is some sort of truth. It may not be 99 and $^{44}/_{100}$ths percent accurate or truthful.

I have been handed a note that Senator Levin is on his way with some questions. I have additional questions concerning policy directives issued by the Office of Federal Procurement Policy. OFPP recommended back in August 1981 that each Federal agency should develop a procurement agenda in advance of each fiscal year.

Has DOD done that?

Ms. GILLEECE. I apologize. We don't know exactly what procurement agenda references.

Senator COHEN. It refers to procurement policy planning. In other words, each agency is required to set forth its procurement plans betfore the fiscal year begins to try to get some sort of projection as to what is going to be required and have some sense of orderliness, to eliminate the hurry up spending.

OFPP issued a policy letter in August 1981 which required every Federal agency to develop procurement agendas in advance of each fiscal year.

Has DOD done that?

Ms. GILLEECE. We will provide the answer for the record.

Senator COHEN. Fine.

[The information follows:]

DOD POLICY ON END-OF-YEAR SPENDING

Summary: DOD took immediate action to implement the OFPP Policy Letter 81-1. Attached examples of how this policy letter was implemented by DOD Components as provided to OFPP are provided for the record.

DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
WASHINGTON, D.C. 20310

SARDA

11 March 1982

MEMORANDUM FOR DEPUTY UNDER SECRETARY OF DEFENSE RESEARCH AND ENGINEERING (ACQUISITION MANAGEMENT)

SUBJECT: Procurement Procedures, Advance Procurement Planning, and Review of End-of-Year Purchases

As requested by your 24 August 1981 memorandum, same subject, Department of the Army implementation of OFPP Policy Letter 81-1 is forwarded herewith (Incl 1). Inclosures 1 and 2 of Army Acquisition Letter 82-6 provide changes to the Army DAR Supplement relating to Advance Acquisition Planning, Contract Action Logs, Lead Times and Cut-Off Dates. Also inclosed is our letter of 4 September 1981, subject: Reducing and Controlling Unnecessary Year-End Spending. It should be noted that this letter requires further implementation by contracting activities and subordinate contracting offices.

FOR THE DEPUTY ASSISTANT SECRETARY OF THE ARMY (ACQUISITION):

H. J. Dubicki

2 Incl

H. J. Dubicki
Deputy for Acquisition Policy

DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
WASHINGTON, D.C. 20310

SARDA

5 MAR 1982

SUBJECT: Acquisition Letter (AL) 82-6, Procurement Procedures, Advance Procurement Planning, and Review of End-of-the-Year Purchases

SEE DISTRIBUTION

This Acquisition Letter contains five items:

a. Implementation of OMB and OSD guidance regarding Advance Procurement Planning.

b. New ADARS coverage on Publicizing by Synopsis.

c. Information regarding Progress Payment Procedures.

d. Information regarding Use of BPA's for Library Support.

e. Deputy Secretary of Defense memorandum regarding Acquisition Initiative #8, Appropriate Contract Type.

1. As a result of Office of Federal Procurement Policy, OMB, Policy Letter 81-1, dated 13 August 1981, and OUSDRE Memorandum, dated 24 August 1981, subjects as above (see SARDA letter, dated 4 September 1981), ADARS 1-2100 is changed as follows:

a. 1-2100.6(a) is modified by adding the following sentence: "Deviation from this requirement must be approved by the addressee in 1-150(b)(11) for DARCOM requirements under (b) below, and by the addressee in 1-150(b)(6) for the requirements in (d) below."

b. 1-2100.6(b) is changed to read as follows:

> "(b) Plans or updates thereof which include advanced, engineering, or operational systems development (see DAR 4-101(a)) estimated at $2,000,000 or more shall be approved by the addressee in 1-150(b)(11) where DARCOM is the contracting activity, or by the Head of Contracting Activity, or principal assistant responsible for contracting, for all other actions."

BARDA
SUBJECT: Acquisition Letter (AL) 82-6, Procurement Procedures, Advance Procurement Planning, and Review of End-of-the-Year Purchases

c. 1-2150 "Advance Acquisition Planning System" is added as set forth in Inclosure 1.

d. 1-2151 "Lead-Times and Cut-Off Dates" is added as set forth in Inclosure 2.

2. ADARS 1-1003.2 is added as follows:

> "1-1003.2 Time of Publicizing. Purchasing offices shall, when practicable, forward synopses to the Commerce Business Daily in time to allow publication at least ten days prior to issuance of solicitations (fourteen days for A-E services and Research and Development procurements)."

3. The following is an information item authorized for release by the DAR Council:

Progress Payment Policies and Procedures. The revised Department of Defense Progress Payment Policies and Procedures published as item II, Defense Acquisition Circular 76-31, dated 30 October 1981, are intended to apply equally to holders of Basic Ordering Agreements. Accordingly, and at the earliest practicable date, contract activities should conduct reviews of outstanding Basic Ordering Agreements, as prescribed by DAR 3-410.2(c)(5), and revise them, as appropriate, to conform with current progress payment provisions.

4. The following is an information item:

Use of Blanket Purchase Agreements (BPA) for Library Support. Library material requirements often consist of a single copy of a book or periodical which can be obtained from such sources as local bookstores, book jobbers, or publishers. A substantial number of Army contracting offices are using purchase orders exclusively to acquire library materials rather than Blanket Purchase Agreements (BPA's). Although there are instances where library materials should be purchased by the use of purchase orders (e.g. quantity textbook orders for planned classes), BPA procedures are more suited to many library materials purchases and should be used where appropriate in order to minimize administrative costs and enhance responsiveness and efficiency (see DAR 3-605). Where feasible and appropriate under ADARS 3-605.3(d), library personnel may be authorized by contracting officers to make BPA calls in order to save time, reduce administrative costs in the contracting and disbursement functions, and make use of special expertise in this area of contracting. Establishment of BPA's for library materials should be coordinated with local library personnel.

SARDA
SUBJECT: Acquisition Letter (AL) 82-6, Procurement Procedures, Advance Procurement Planning, and Review of End-of-the-Year Purchases

5. Provided for information and appropriate implementation is a memorandum from the Deputy Secretary of Defense, dated 6 January 1982, subject: Acquisition Study Initiative #8 — Appropriate Contract Type — ACTION MEMORANDUM (Inclosure 3). This memorandum provides a challenge to all acquisition managers and a clear statement of our responsibility to use our collective skills to improve the full range of acquisition/contracting strategy actions. Systemic coordinated advance planning should enhance our performance in this critical area.

6. Heads of Contracting Activities shall provide this office a copy of their implementation of ADARS 1-2150 and 1-2151 no later than 28 May 1982. DARCOM activities will provide their implementing coverage to DARCOM for consolidation and forwarding together with any changes made to the DARCOM Acquisition Instructions. Information on how coordinated acquisition planning will be managed by MACOM's and subordinate commands is also requested. Existing advance planning systems and procedures should be retained and expanded upon in implementation actions.

7. Addressees are requested to expedite distribution of this Acquisition Letter to all subordinate activities and contracting offices.

FOR THE DEPUTY ASSISTANT SECRETARY OF THE ARMY (ACQUISITION):

R. J. Dubicki
Deputy for Acquisition Policy

3 Incl

THE FOLLOWING IS A CHANGE TO THE ADARS:

1-2150 Advance Acquisition Planning System

(a) Advance planning is an essential element of the acquisition process. Some degree of such planning is required for every contract action from simplified purchases to major weapon systems. Although DAR Section I, Part 21, is primarily focused on development and production of weapon systems, the principles of coordinated, integrated, comprehensive planning and interdisciplinary analysis apply to all proposed contract actions.

(b) Each Head of Contracting Activity shall establish an Advance Acquisition Planning (AAP) System affecting, as a minimum, all significant or sensitive contracting requirements. The purpose of the AAP System shall be to assure effective utilization of resources; to avoid unbalanced year-end spending; and to enhance interdisciplinary coordination, prioritization, and the overall quality of the acquisition process.

(c) Each Head of Contracting Activity shall establish monetary thresholds and other parameters for inclusion of proposed contract actions under their AAP System. All Designated Acquisition Programs under AR 1000.1 and project/program managed contract actions, regardless of dollar value, shall be planned under the AAP System.

1-2150.1 Description. The AAP System shall include the following minimum characteristics:

(a) Description of responsibilities, authorities and interfaces of the various command and functional elements involved in the acquisition process from budget formulation through contract execution, and, in particular, the critical role and relationships of the contracting office.

(b) Description of critical elements for planning proposed contract actions under formalized advance acquisition plans (e.g., a manual or automated system for tracking requirements from the budget cycle through contract execution; identification of milestone events, such as: preparation of funding documents, development of acquisition strategy, preparation of statements of work, validation of requirements, synopsis, breakout or similar reviews; requirements prioritization development and management review actions throughout the fiscal year to preclude high priority projects from slipping to the end of the year or otherwise resulting in foreshortening of the contracting process).

(c) Overall management control of the planning system at headquarters and installation levels, including authority for resolving conflicts between contracting offices and project/program or requirements offices.

(d) Identification of concurrent and iterative lead times for various phases of the acquisition process (see 1-2151).

Incl 1

(e) Procedures for implementation and use of the AAP System and for obtaining waivers.

(f) Detailed guidance on the types and dollar thresholds of proposed contract actions subject to the AAP System and what type of coordinated planning is expected for remaining contract actions.

(g) Special review procedures for last quarter contracting actions to assure compliance with advance acquisition plan; revalidate need; validate acquisition/contracting strategy (particularly if non-competitive); assure that price reasonableness is attained.

(h) Conditions and procedures for revising advance acquisition plans (e.g., budget changes, emergency actions, reprioritization, workload assessments).

1-2150.2 Advance Acquisition Planning (APP) Related Actions. Heads of Contracting Activities and subordinate commanders shall develop and publish guidance addressing:

(a) Coordinated development and review of statements of work, item descriptions, equipment and systems specifications, and related requirements data, to assure optimum industry response to the Government's needs and reasonable prices through maximum practicable competition.

(b) Consideration of essential elements of acquisition/contracting strategy such as: breakout considerations, type of contract, method of contracting, economic production quantities, technical and cost risk distribution, critical technical and management evaluation factors, special standards of responsibility, small and disadvantaged business considerations, life cycle costing, design-to-cost, integrated logistics support requirements, multi-year procurement potential.

(c) Development and maintenance of a Contract Action Log providing a record of major or high waste vulnerability contract actions. High waste vulnerability contract actions will include, as a minimum, contracts for:

(1) Analytical support services (see AR 5-14 and DAR Section XXII, Part 11);

(2) Non-competitive actions in excess of $500,000;

(3) Specified make and model equipment in excess of $100,000;

(4) Administrative support equipment in excess of $100,000;

(5) Indefinite delivery type service contracts estimated to exceed $500,000; and

(6) Purchases of periodicals, pamphlets, or audiovisual products in excess of $25,000.

The Contract Action Log will normally identify the following information: procurement instrument identification numbers (including supplementary numbers); estimated or actual contract value; name and address of contractor; short description of contract requirements; period of performance or scheduled completion date; cognizant procuring contracting officer or contract specialist and telephone number; and location of contract file. Contract Action Logs shall be maintained in a central location at each contracting office. Any listed contract will be retained on the list for two years or until contracts are completed or terminated, whichever is longer.

THE FOLLOWING IS A CHANGE TO THE ADARS:

1-2151 Lead Times and Cut-Off Dates

(a) Each Head of Contracting Activity shall establish or require establishment and promulgation of standard lead times for the various types of procurement actions processed by contracting offices (e.g., competitive, non-competitive, advertised, negotiated, simplified purchases, requiring technical evaluation or audit, Section 8(a), etc.). These lead times shall allow sufficient time for preparation of solicitations (including any necessary coordination with the requiring element regarding the description of the requirement), development of contracting strategy, receipt and evaluation of bids or proposals, audit, negotiation, board or business clearance reviews, source selection, and preparation of contract documents, in an orderly manner.

(b) In conjunction with the publication of standard lead times, cut-off dates for submission to the contracting office of procurement requests requiring action by the end of a fiscal year shall be established. Cut-off dates, as well as lead times, may vary depending on the nature and dollar value of the required contract action. Exceptions to established lead times and cut-off dates shall be held to a minimum and require authorization at a level not lower than the Chief of the contracting office.

(c) Information outlined in (a) above and 1-2150, and additional guidance for use by all personnel involved in acquiring supplies, services, or materiel, shall be published in a command-level 715 series regulation, or similar publication affording wide dissemination, providing for local implementation as appropriate.

Incl 2

THE DEPUTY SECRETARY OF DEFENSE

WASHINGTON, D.C. 20301

JAN 6 1982

MEMORANDUM FOR THE SECRETARIES OF THE MILITARY DEPARTMENTS

SUBJECT: Acquisition Study Initiative #8 -- Appropriate Contract Type -- ACTION MEMORANDUM

This initiative represents my personal commitment to foster cost and technical realism in acquiring major weapon systems. There is a need not only to assess the specific risks associated with individual acquisitions, but also to apportion those risks between industry and government in a rational and fair manner. We must give strong management emphasis at all levels of DoD to fostering realistic business decisions which ultimately manifest themselves in the contractual arrangement. We must always attempt to limit cost exposure not through the unreasonable transfer of risk to industry, which characteristically ends up costing the government more, but through the selection of appropriate contract forms that provide effective continuing incentives to the contractor to hold costs down. Industry feedback can be helpful in formulating our acquisition strategies, but ultimate responsibility for developing and implementing realistic approaches to the acquisition process through the use of tailored contractual strategies is ours.

I ask for your personal support in assuring that program managers and contracting officers employ the full range of their professional and business acumen in the formulation of appropriate contract type. We must employ their inherent knowledge, independent judgment and sense of fair play in achieving a balanced acquisition strategy.

Frank Carlucci

Incl 3

DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
WASHINGTON, D.C. 20310

SARDA 4 September 1981

SUBJECT: Reducing and Controlling Unnecessary Year-End Spending

SEE DISTRIBUTION

1. The Office of Management and Budget (OMB) in their memorandum M-81-13, dated 12 August 1981, subject as above (Incl 1) has again requested that "Public funds . . . be used only for necessary program purposes and . . . not be obligated solely to commit funds before they lapse." As cited in the OMB Memorandum, the Office of Federal Procurement Policy (OFPP) has issued OFPP Policy Letter 81-1, dated 13 August 1981, subject: Procurement Procedures, Advance Procurement Planning, and Review of End-of-Year Purchases, which is inclosed for your information.

2. As requested by the Acting Deputy Under Secretary of Defense (Acquisition Management) this office will issue guidance implementing the OFPP Policy Letter. In the interim, Heads of Contracting Activities and subordinate commanders and contracting managers are requested to assure that all personnel participating in the acquisition process are made aware of their responsibilities for:

a. Continuous systematic and coordinated advance procurement planning to allow a balanced workload and sufficient leadtimes for proper operation of the competitive procurement process.

b. Validation of requirements, especially proposed noncompetitive procurement actions, consulting and related services, unsolicited proposals, and unplanned or unprogramed supplies or services.

c. Maintaining the integrity of the contracting process, especially by means of adequate competition and performance of cost or price analysis as appropriate.

d. Compliance with prescribed policies, regulations, and procedures; and application of sound business judgment and practices.

SARDA 4 September 1981
SUBJECT: Reducing and Controlling Unnecessary Year-End Spending

2. Management controls at all levels should be maintained to preclude wasteful practices in year-end contracting. Effective achievement of this objective will require a year-round cooperative effort by all managers and professionals involved in the acquisition cycle from budget preparation and requirement generation through solicitation and contract execution.

FOR THE DEPUTY ASSISTANT SECRETARY OF THE ARMY (ACQUISITION):

H. J. Dubicki

2 Incl

Henry J. Dubicki
Deputy for Acquisition
Policy

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. [illegible]

M-81-13 August 12, 1981

TO THE HEADS OF EXECUTIVE DEPARTMENTS AND ESTABLISHMENTS

SUBJECT: Reducing and Controlling Unnecessary Year-End Spending

As a part of this Administration's continuing commitment to eliminate unnecessary and wasteful spending, I ask you to make sure that your agency uses public funds wisely by avoiding unnecessary year-end spending. I cannot overemphasize that the prevention of unneeded and unwise Federal Government spending is an essential part of our efforts to control fraud, waste, abuse, and inefficiency in Federal programs. Public funds will be used only for necessary program purposes and will not be obligated solely to commit funds before they lapse. Good procurement practices, which include requirements for competition and other actions to insure that fair and reasonable prices are paid by the Government, will not be disregarded in an effort to obligate funds quickly.

Specifically, I ask that your agency take immediate actions to insure that:

-- Obligations for the fourth quarter of the fiscal year are no higher than for the third quarter, except where seasonal requirements, essential program objectives, or procurement lead-times justify a higher level;

-- Orders for services, supplies, materials, and equipment are not more than needed to meet approved and essential program objectives;

-- Grants are subjected to rigorous review and are not made just to keep funds from lapsing; and

-- Production or procurement of periodicals, pamphlets, and audiovisual products (OMB Bulletin No. 81-16, OMB Circulars No. 3 and No. 114), procurement of certain equipment (OMB Bulletin No. 81-9), procurement of consulting and related services (OMB Bulletin No. 81-8, OMB Circular No. A-120) and travel and transportation of persons (OMB Bulletin No. 81-7) are in conformance with the respective OMB instructions.

Contracting officers, program managers, and policy officials who are responsible for initiating or reviewing procurement and grant actions should carry out their responsibilities in a way that assures compliance with this guidance.

Inspectors General have been asked to pay particular attention to year-end spending this year. Inspectors General personnel, auditors, and legal counsel should consider noncompliance with the aforementioned requirements to be an indication of waste.

The Office of Federal Procurement Policy will soon issue Policy Letter 81-1 requiring each agency to establish an advance procurement planning system, review procedures for fourth quarter spending, and lead-time and cut-off dates for consideration of procurement requests. These requirements will be useful management controls to assist agencies in avoiding future year-end spending and I ask that you and your staff give a high priority to installing these controls as soon as possible.

I count on your full cooperation and personal attention to save the taxpayers as much money as possible in support of the President's fiscal objectives.

David A. Stockman
Director

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

OFFICE OF FEDERAL
PROCUREMENT POLICY

OFFICE OF THE SECRETARY OF DEFENSE

AUG 13 1981

POLICY LETTER 81-1

TO THE HEADS OF EXECUTIVE DEPARTMENTS AND ESTABLISHMENTS

SUBJECT: Procurement Procedures, Advance Procurement Planning, and Review of End-of-Year Purchases

It is the responsibility of the head of each agency to assure efficient and economical procurement. Consistent with that responsibility is an obligation to reduce wasteful practices resulting from hurried or unnecessary end-of-year procurement. In carrying out these responsibilities, the Head of each Executive Department or Establishment shall establish the following management controls:

1. Procurement procedures providing lead time and cut-off dates. Each agency shall develop procedures that allow sufficient lead time to prepare solicitations, obtain and evaluate bids or proposals, audit, negotiate, and make contract awards in an orderly manner. The procedures shall specify the lead time required and establish firm cut-off dates for submission to procurement offices of requests for contract action to be completed by the end of a fiscal year. The lead times and cut-off dates may vary with the type of contract action and dollar thresholds. Exceptions to the lead time and cut-off date procedures should be kept to a minimum and approved only under extraordinary circumstances.

2. Advance Procurement Planning. Agencies shall issue procedures that require an Advance Procurement Planning System (APP) for each activity. The procedures shall include:

   — Establishment of a specific threshold above which procurements are to be considered major;

   — Development and maintenance of an advance procurement plan to cover major procurement requirements and other requirements with high waste vulnerability, such as consulting services, certain equipment, periodicals, pamphlets, or audiovisual products. The plan should be developed well in advance of the fiscal year in which the acquisition will be made;

- Flexibility to allow revisions to the plan, but only to reflect budget changes, emergencies, and changes in program direction;
- Procurement planning that begins concurrently with the agency budget process;
- A requirement that needs are specified in a form that permits effective competition and innovation;
- A means to resolve disagreements between procurement and project offices;
- Close control of major and high waste vulnerability purchases to assure that they are consistent with the advance procurement plan; and
- An ongoing program to assess the appropriateness of the methods used to satisfy needs, including cost effectiveness, whether gold-plating will result, and life cycle costing, where appropriate.

3. Review procedures for the last quarter spending. Each agency shall develop review procedures that require: (a) close control of purchases made in the last quarter to assure that they are consistent with the advance procurement plan, (b) reevaluation of the need for purchases made in the last quarter, (c) good procurement practice and accountability to assure that contracts are awarded only if prices are reasonable, and (d) award of contracts on the basis of competition unless award on some other basis is significantly to the advantage of the agency.

4. Contract Action Log. Each procuring activity shall keep a log of major or high waste vulnerability contract actions.

Within 60 days after the effective date of this letter the head of each agency shall report to OFPP the action taken to implement the provisions of this Policy Letter. The report shall describe the advance procurement planning process, the procedures to require lead time and cut-off dates, the review procedures, and the implementation of the contract log.

For further information with respect to this policy directive, contact Mr. Jack Nadol, Assistant Administrator for Procurement Practices, telephone 395-3455.

EFFECTIVE DATE: This Policy Letter is effective August 28, 1981.

CONCURRENCE: This letter has been concurred in by the Director of OMB.

Donald E. Sowle

Donald E. Sowle
Administrator

DEFENSE LOGISTICS AGENCY
HEADQUARTERS
CAMERON STATION
ALEXANDRIA, VIRGINIA 22314

IN REPLY REFER TO DLA-PPR

16 OCT 1981

MEMORANDUM FOR DEPUTY UNDER SECRETARY OF DEFENSE FOR RESEARCH AND ENGINEERING (ACQUISITION MANAGEMENT)

SUBJECT: Procurement Procedures, Advance Procurement Planning, and Review of End-of-Year Purchases

In response to your Memorandum of 24 August 1981, a copy of our implementation of Office of Federal Procurement Policy Letter 81-1 is enclosed. While our implementation was not issued prior to the end of the Fiscal Year 1981, this Agency had previously implemented Office of Management and Budget letter of 25 June 1980, subject: "Controlling Year-End Buying." In addition, Section I, Part 21, of the Defense Logistics Agency Procurement Regulation requires procurement planning for all purchases other than those made under simplified small purchase procedures.

FOR THE DIRECTOR:

R. F. CHIESA
Executive Director
Contracting

1 Encl

DEFENSE LOGISTICS AGENCY
HEADQUARTERS
CAMERON STATION
ALEXANDRIA, VIRGINIA 22314

IN REPLY REFER TO DLA-PPR
CONTRLTR 81-26 18 October 1981

SUBJECT: Procurement Procedures, Advance Procurement Planning, and Review of End-of-Year Purchases

TO: DCSC-P, DESC-P, DFSC-P, DGSC-P, DISC-P, DPSC-P,
DDOU, DDMT, DDTC, DLSC, DIPEC, DPDS, DASC-IS

1. Office of Federal Procurement Policy (OFPP) and Deputy Under Secretary of Defense for Research and Engineering (Acquisition Management) (DUSDR&E(AM)) guidance on the above subject is enclosed for implementation in accordance with guidance contained herein.

2. The problem of wasteful spending at year's end arises from funds which cannot be used after year's end. This is not the case with the Defense Logistics Agency (DLA) Stock Fund. Accordingly, the requirements of this CONTRLTR and Enclosures do not apply to purchases made using DLA Stock Fund monies. In addition, DAR 5-1108.2 already provides a cut-off date for submission of MIPRs which are to cite funds of the Requiring Department. This CONTRLTR does not, therefore, apply to MIPR procurements.

3. The following guidance supplements the instructions in the numbered items in the OFPP and DUSDR&E(AM) letters:

a. Item 1: Requirements for contract actions which must be awarded by the end of the fiscal year must be submitted to contracting by 31 July of that fiscal year. Solicitations for such requirements received after 31 July shall not be issued unless approved by the Chief of the Purchasing Office.

b. Item 2: The requirements of DLPR Section I, Part 21, satisfy the requirements of Item 2.

c. Item 3: Contracting Officers and reviewing officials shall be especially vigilant in conducting normal DAR/DLPR duties during the fourth quarter to assure that requirements are valid and are filled in accordance with sound procurement practice.

d. Item 4: The contract action log is required for all purchases of consulting services, periodicals, pamphlets, and audiovisual products. Existing logs may be used for this purpose, provided some means is devised to readily identify these high waste vulnerability contract actions.

DLA-PPR Page 2
CONTRLTR 81-26
SUBJECT: Procurement Procedures, Advance Procurement Planning, and Review of End-of-Year Purchases

4. This CONTRLTR is effective immediately, and remains in effect until published in the DLPR, but not more than one year from the date of publication.

FOR THE DIRECTOR:

2 Encls

R. F. CHIESA
Executive Director
Contracting

OFFICE OF THE UNDER SECRETARY OF DEFENSE
WASHINGTON, D.C. 20301

RESEARCH AND
ENGINEERING

24 AUG 1981

MEMORANDUM FOR Assistant Secretary of the Army (RDA)
Assistant Secretary of the Navy (S&L)
Assistant Secretary of the Air Force (RD&L)
Director, Defense Communications Agency
Director, Defense Intelligence Agency
Director, Defense Logistics Agency
Director, Defense Mapping Agency
Director, Defense Nuclear Agency
Director, National Security Agency

SUBJECT: Procurement Procedures, Advance Procurement Planning, and Review of End-of-Year Purchases

The enclosed Policy Letter 81-1 from the Administrator, Office of Federal Procurement Policy (OFPP), dated August 13, 1981, is forwarded for action. It requires that procurement management controls be established to reduce wasteful practices resulting from hurried or unnecessary end-of-year procurement.

In furtherance of this direction, I request that you issue instructions immediately to all of your procurement organizations stressing the need for managers at all levels to institute controls to avoid wasteful practices in hurried end-of-year procurement. Every possible effort shall be made to avoid any deviation from prescribed policies and procedures or sound practices for the purpose of obligating funds that will expire at the end of the fiscal year.

Your instructions should incorporate the specific guidance provided in the enclosed OFPP Policy Letter as described below:

1. Procurement procedures providing lead time and cutoff dates. Procedures at each purchasing office shall specify the lead time required and establish firm cutoff dates for submission of requests for contract action to be completed by the end of the fiscal year.

2. Advance procurement planning. DAR, Section I, Part 21, satisfies the general thrust of this requirement. In addition, special attention shall be given to requirements with potentially high waste vulnerability, such as consulting services, certain equipment, periodicals, pamphlets, or audiovisual products.

3. Review procedures for last quarter spending. Procuring activities shall develop review procedures consistent with the direction provided in the enclosed OFPP Policy Letter.

4. Contract action log. Each purchasing office shall keep a log of major or high waste vulnerability contract actions.

Please provide this office with a copy of your implementing instructions.

R. F. Trimble

ROBERT F. TRIMBLE
ACTING DEPUTY UNDER SECRETARY
(ACQUISITION MANAGEMENT)

Enclosure

OFFICE OF
THE SECRETARY OF DEFENSE

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

OFFICE OF FEDERAL
PROCUREMENT POLICY

AUG 13 1981

POLICY LETTER 81-1

TO THE HEADS OF EXECUTIVE DEPARTMENTS AND ESTABLISHMENTS

SUBJECT: Procurement Procedures, Advance Procurement Planning, and Review of End-of-Year Purchases

It is the responsibility of the head of each agency to assure efficient and economical procurement. Consistent with that responsibility is an obligation to reduce wasteful practices resulting from hurried or unnecessary end-of-year procurement. In carrying out these responsibilities, the Head of each Executive Department or Establishment shall establish the following management controls:

1. Procurement procedures providing lead time and cut-off dates. Each agency shall develop procedures that allow sufficient lead time to prepare solicitations, obtain and evaluate bids or proposals, audit, negotiate, and make contract awards in an orderly manner. The procedures shall specify the lead time required and establish firm cut-off dates for submission to procurement offices of requests for contract action to be completed by the end of a fiscal year. The lead times and cut-off dates may vary with the type of contract action and dollar thresholds. Exceptions to the lead time and cut-off date procedures should be kept to a minimum and approved only under extraordinary circumstances.

2. Advance Procurement Planning. Agencies shall issue procedures that require an Advance Procurement Planning System (APP) for each activity. The procedures shall include:

    — Establishment of a specific threshold above which procurements are to be considered major;

    — Development and maintenance of an advance procurement plan to cover major procurement requirements and other requirements with high waste vulnerability, such as consulting services, certain equipment, periodicals, pamphlets, or audiovisual products. The plan should be developed well in advance of the fiscal year in which the acquisition will be made;

- Flexibility to allow revisions to the plan, but only to reflect budget changes, emergencies, and changes in program direction;
- Procurement planning that begins concurrently with the agency budget process;
- A requirement that needs are specified in a form that permits effective competition and innovation;
- A means to resolve disagreements between procurement and project offices;
- Close control of major and high waste vulnerability purchases to assure that they are consistent with the advance procurement plan; and
- An ongoing program to assess the appropriateness of the methods used to satisfy needs, including cost effectiveness, whether gold-plating will result, and life cycle costing, where appropriate.

3. Review procedures for the last quarter spending. Each agency shall develop review procedures that require: (a) close control of purchases made in the last quarter to assure that they are consistent with the advance procurement plan, (b) reevaluation of the need for purchases made in the last quarter, (c) good procurement practice and accountability to assure that contracts are awarded only if prices are reasonable, and (d) award of contracts on the basis of competition unless award on some other basis is significantly to the advantage of the agency.

4. Contract Action Log. Each procuring activity shall keep a log of major or high waste vulnerability contract actions.

Within 60 days after the effective date of this letter the head of each agency shall report to OFPP the action taken to implement the provisions of this Policy Letter. The report shall describe the advance procurement planning process, the procedures to require lead time and cut-off dates, the review procedures, and the implementation of the contract log.

For further information with respect to this policy directive, contact Mr. Jack Nadol, Assistant Administrator for Procurement Practices, telephone 395-3455.

EFFECTIVE DATE: This Policy Letter is effective August 28, 1981.

CONCURRENCE: This letter has been concurred in by the Director of OMB.

Donald E. Sowle
Administrator

Ms. Gilleece. I do know that we do advance procurement planning. For example, we have a 5-year defense plan regarding programs. We do have a procurement executive within the Department of Defense, Dr. DeLauer who clearly does planning.

Mr. Gordon will comment on year-end spending.

Senator Cohen. You see, we started hearings several years ago in the Governmental Affairs Committee to try to deal with the problem of hurry-up spending. We found more and more agencies were simply waiting until the last few weeks of the last quarter and saying if we don't spend this money, Congress will cut our budget accordingly next year.

As a result of the hearing, DOD as well as others did implement some plans to try to have a greater perspective of what they were going to be purchasing that year and try to spread it out accordingly and get more competition.

It made great news, look at all the items we are buying, oriental rugs, color TV sets, and so forth. That is not really where the money is being lost. Those are the more graphic items that caught the public's eye. Money was lost because many of the contracts were going by sole-source contracting in the last few weeks of the last quarter and we were losing $1 to $2 billion a year.

Mr. Gordon. We can provide you material on existing DOD regulations which deal with the question of spending a disproportionate amount of your procurement authorization in the last quarter and need for planning.

It is very difficult sometimes to plan in terms of specific procurement action just how they will be distributed over the fiscal year because we are never really quite sure when we are going to get our authorization and appropriation. Sometimes the late receipt of that causes us to bundle at the end of the fiscal year a lot of actions that we could not proceed with earlier because we can't have new starts.

I understand your question. We will provide for the record our policy guidance and direction on this matter. I think our record will not support the argument that we do a disproportionate amount of spending in the last quarter of the fiscal year.

[The information follows:]

DOD Control of End-of-Year Spending

Summary: Since fiscal year 1953 the annual Appropriation Act for DOD has provided that not more than 20 percent of the appropriations, which are limited for obligation during the fiscal year, shall be obligated during the last two months. The 20 percent limitation applies only to annual appropriations (personnel compensation, support, and services). These funds provide for operation and maintenance (O&M). The limitation does not apply to the following categories: purchases citing multi-year funds, i.e., Procurement funds and Research. Development, Test, and Evaluation funds, purchases citing no-year funds, i.e., stock funds, purchases arising from Foreign Military Sales, civil construction projects by the Corps of Engineers, obligations for support of active duty training of civilian components or summer camp training of the Reserve Officers Training Corps., and obligations, including purchases, citing supplemental O&M appropriations.

In fiscal year 1982, DOD Components placed 12.9 million contract actions totaling $125 billion. Our statistical reporting system for contract awards does not identify the appropriation account code as the system was not designed to be a fund control device. However. we estimate that appropriately 30 percent of our contract dollar obligations cite annual funds.

Compliance with the 20 percent limitation is monitored by the Assistant Secretary of Defense (Comptroller) and his counterparts in the Military Departments and Defense Agencies. O&M funds are released and allocated by quarters. Obligations are closely watched and a formal mid-year review conducted. Each year DOD components are required to certify in their July report of appropriation status, that the 20 percent limitation will be met. In fiscal year 1982 O&M obligations for the last two months were 16.2 percent (Army—18.7 percent, Navy—14.3 percent, Air Force—15.6 percent, Defense Agencies—17.8 percent. These percentages are based on the current limitation set forth in the annual Appropriation Act for DOD.

Attached are some of the DOD policy statements on year end spending in fiscal year 1982.

ASSISTANT SECRETARY OF DEFENSE
WASHINGTON, D.C. 20301

COMPTROLLER

17 AUG 1982

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
DIRECTORS OF DEFENSE AGENCIES
DIRECTOR, WASHINGTON HEADQUARTERS SERVICES
PRESIDENT, UNIFORMED SERVICES UNIVERSITY OF THE HEALTH SCIENCES

SUBJECT: Reducing and Controlling Wasteful Year-End Spending

Your attention is directed to the enclosed memorandum on year-end spending. The Department of Defense (DoD) fully supports the goals and actions outlined by the Office of Management and Budget. Separate, related guidance on prevention of wasteful year-end procurement will be issued through acquisition channels.

Our financial control systems in the DoD are quite adequate and provide for routine surveillance over matters such as this. However, extraordinary efforts should be taken to step up surveillance over abusive spending habits intended solely to avoid lapsing unprogramed financing. At a time when the administration is taking extraordinary steps to reduce the deficit, we should all recognize that lapsed budget authority, no matter how much or how little, in fact reduces spending and therefore reduces the deficit.

Your attention is specifically directed to the sections in the enclosed memorandum on efficient and effective obligation of funds provided by 1982 supplemental appropriations, obligations for the fourth quarter of the fiscal year, curbing travel needs, and scrutinizing use of consulting services.

Year-end spending is continually a matter of congressional attention. Any abusive practices on our part will only give rise to additional restrictions on the use of appropriated funds.

I would appreciate it if you would bring this matter to the attention of all budget and financial personnel throughout the Department. In view of the annual certification of August and September obligations applicable to Section 718 of the General Provisions of the Defense Appropriation Act, your supplementary guidance should be expeditious.

Jack R Borsting

Jack R. Borsting
Assistant Secretary of Defense

Enclosure

1982 AUG 10 PM 2:49
OFFICE OF
THE SECRETARY OF DEFENSE

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. [illegible]

M-82-6 August 4, 1982

MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

FROM: DAVID A. STOCKMAN
DIRECTOR

SUBJECT: Reducing and Controlling Wasteful Year-end Spending

The fight against fraud and waste in Federal programs is a top priority of this Administration; there is simply no excuse for wasting the taxpayer's dollars. We must move aggressively to prevent wasteful year-end spending by Federal officials who obligate funds simply so that the funds will not be reported as unobligated or lapse at the end of the fiscal year. Since we are in the final quarter of fiscal year 1982, please give special attention to preventing this potential problem in your agency. Your personal attention is necessary because the only effective way to eliminate this type of waste is vigorous management attention that is supported by strong audit, investigation, and enforcement programs.

I have asked the Administrator of the Office of Federal Procurement Policy to assist you by providing guidance on ways to prevent wasteful and unnecessary year-end procurement. Also, the agency Inspectors General and the President's Council on Integrity and Efficiency are available to provide advice on ways to prevent specific types of wasteful year-end spending, as well as effective audit, investigation, and enforcement methods.

I ask that you issue instructions to your staff to insure that:

-- Obligations of funds provided by 1982 supplemental appropriations are made only in an efficient and effective manner. Funds that are provided too late to be used efficiently and effectively should not be obligated.

-- Obligations for the fourth quarter of the fiscal year are no higher than the average for the first three quarters, except where seasonal requirements, essential program objectives, circumstances unique to this fiscal year, or lead-times justify a higher level.

-- Orders for services, supplies, materials, and equipment are not more than needed to meet approved essential program objectives. (Additional procurement guidance will be provided by the Administrator of the Office of Federal Procurement Policy.)

-- Grants and other forms of Federal assistance are subjected to rigorous review, meet current priorities, are funded only in justified amounts, and are not made just to keep funds from lapsing or to keep them from being reported as unobligated.

-- Use of funds in areas that are particularly vulnerable to wasteful spending are reduced or controlled as a precautionary measure in accordance with previous OMB instructions. For example:

- Federal travel needs to be curbed at or below the level estimated for 1982 in the President's 1983 Budget, and controlled in accordance with OMB Bulletin No. 82-11.
- Use of consulting services should be closely scrutinized for compliance with OMB Circular No. A-120. Also, seriously consider using the Assistant Secretaries for Management Group's Model Control System for consulting services. It was designed to assist agencies in establishing, improving, and evaluating their current consulting services system.

Contracting officers, program managers, and policy officials who are responsible for initiating or reviewing procurement and grant actions should carry out their responsibilities in a way that assures compliance with this guidance.

Inspectors General have again been asked to pay particular attention to year-end spending. Inspector General personnel, auditors, and legal counsel should consider noncompliance with the aforementioned requirements to be an indication of waste. You should ask your Inspector General to conduct an assessment of the validity of a sample of the procurements awarded in the last quarter of the fiscal year. Such an approach has demonstrated a valuable deterrent effect in the past. To the extent allowed by law or regulations, disciplinary action should be taken against executive officials and employees who waste public funds.

I count on your full cooperation and personal attention to save the taxpayers as much money as possible in support of the President's objectives.

19 AUG 19

MEMORANDUM FOR Assistant Secretary of the Army (RDA)
Assistant Secretary of the Navy (S&L)
Assistant Secretary of the Air Force (RD&L)
Director, Defense Communications Agency
Director, Defense Intelligence Agency
Director, Defense Logistics Agency
Director, Defense Mapping Agency
Director, Defense Nuclear Agency
Director, National Security Agency

SUBJECT: Prevention of Wasteful Year-End Spending

The attached memorandum from the Office of Federal Procurement Policy (OFPP) dated August 6, 1982, is forwarded for appropriate action. Please emphasize to all procurement and program personnel the importance of using the OFPP checklist and of complying with Policy Letter No. 81-1. The latter document was originally transmitted by memorandum dated August 24, 1981 (copy attached). The enclosed Office of Management and Budget memorandum of August 4, 1982, is being implemented through Comptroller channels.

[illegible]
[illegible]

Enclosures

1982 AUG 11 AM 4:21
OFFICE OF THE SECRETARY OF DEFENSE

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

OFFICE OF FEDERAL
PROCUREMENT POLICY

AUG 6 1982

MEMORANDUM TO HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

Donald E. Sowle

FROM: Donald E. Sowle, Administrator

SUBJECT: **Prevention of Wasteful Year-End Spending**

The Director of the Office of Management and Budget requested that the Office of Federal Procurement Policy provide guidance on ways to prevent wasteful year-end spending in procurement.

We are committed to increasing the efficiency and effectiveness of the procurement process.

Enclosure 1 is a revised checklist for your use in detecting and preventing end-of-year procurement abuse.

OFPP Policy Letter No. 81-1 (Enclosure 2) requires each agency to have review procedures for fourth quarter spending, and to establish an advance procurement planning system. The procedures developed by your agency to comply with the Policy Letter are useful management controls to assist in avoiding wasteful year-end spending.

We request that you emphasize to all procurement and program personnel the importance of using the OFPP checklist and of complying with Policy Letter No. 81-1.

I cannot overemphasize that prevention of unneeded or unwise Federal spending is an essential part of our efforts to control waste, fraud and mismanagement and to restore public confidence in the integrity of Government. I ask you to continue to use public funds wisely and to be especially alert to unnecessary, nonessential year-end buying during this last quarter of FY 1982.

Enclosures

ENCLOSURE 1

CHECKLIST FOR PREVENTING WASTEFUL YEAR-END SPENDING

A. Need Determination

1. Is the request part of a current approved plan?

2. Is the request for more property or services than is needed to meet approved and essential program objectives?

3. Is the request duplicative in whole or in part?

4. Has a lease vs. purchase review been completed if appropriate?

5. Is the modified request for purchase of additional items or services not contained in the original procurement request or contractor proposal? Is this because estimated funding needs were in excess of the funds actually required to meet the funding requirements of the original request? Is it fully justified?

6. Purchases or orders for equipment, supplies, or services should not be approved unless they have been planned in advance or are needed to meet an emergency and comply with agency implementation of OMB Bulletins No. 81-9 and No. 81-16.

7. Funds should not be obligated for requirements-type or task contracts in excess of anticipated needs based on projections from prior use and current operating levels.

8. The procurement of consultant services and modifications of current consultant services contracts must be reviewed for compliance with OMB Circular No. A-120 and budget controls.

9. Purchases by or orders from General Services Administration, the Defense Logistics Agency, or other central procurement offices, or off Federal Supply Schedules should not be in excess of current use or inventory requirements. Use and inventory requirement must be validated. Orders should not be placed if delivery cannot be made in time to meet current need or inventory requirements.

10. Procurement actions must be reviewed to ensure that they are essential, the minimum necessary, not superfluous or "gold-plated."

11. To avoid duplication or underutilization and to foster greater economy and efficiency, users should ensure maximum utilization of available inventories and the proper use of all available resources including excess property.

12. Intragovernmental agreements for the common use or loan of equipment, services and facilities should be used when cost effective.

13. Items should not be replaced while they still are usable unless replacement is essential to meet program objectives or substantial cost savings will result. Materials and equipment should be repaired and reused whenever practicable.

14. Renovation, or redecorating. should only be done when it is essential to program objectives, required because of lease arrangements or in an emergency to protect the health and safety of employees. In any case, it should only be the minimum necessary.

B. Method of Contractor Selection

1. Will a noncompetitive contract be necessary? Is it fully justified? Have plans been made to prevent subsequent noncompetitive contracts?

2. Are grants reviewed to ensure they are the proper vehicle in accordance with P.L. 95-224 and are not used to avoid procurement procedures?

3. "Unsolicited" proposals should be truly unsolicited and should not be accepted unless they are truly unique or innovative and are for essential program requirement. Award will only be made after strict compliance with regulations on unsolicited proposals.

4. Procurements should not be divided just to come within small purchase procedures. In accordance with good procurement practices, requests should be consolidated if it would be more cost effective to do so. However, this should not be construed to prohibit breakout of items for small or minority business.

5. Short response times or restrictive requirements must not be used as methods to avoid open competition or as means of "steering" contracts.

C. Use of Existing Contracts

1. If the request is for the exercise of options or the funding of the later years of a multi-year contract, is it fully justified, still necessary? Is the option or later year still reasonably priced?

2. If the requests are purchases off Federal Supply Schedules or orders against basic ordering agreements or requirements-type contracts, are they fully justified as to need, pricing and the method of contracting?

3. If the request is to add funds to an ongoing contract with a Government Owned Contractor Operated facility, a Federal Contract Research Center, or a Federally Funded Research and Development Center, is the requirement clearly defined, is it fully justified? Are such contracts being used as a means to circumvent procurement requirements? Are subcontract awards being directed by the Federal agency?

4. Funds obligated to cover unpriced items, such as changes, spare parts and data, should not be in excess of current best estimates of need for those items. Additional obligations in excess of the original procurement request must be clearly justified.

5. Funds for letter contracts should not be obligated in excess of that allowed by regulations, nor should letter contracts be used solely as a vehicle to obligate funds that would otherwise lapse. Other open end types of contracts without firm requirement should not be used.

6. When contracts are modified or supplemental agreements issued to increase the level of effort or procure additional tasks, items or services, the additional requirements must be validated. The subcontracting of substantial parts of such modifications, change orders or tasks may indicate contracts are being used as vehicles to avoid competition.

7. Funds for contractor operated supply stores or other logistic support-type contracts should not be obligated in excess of current requirements or used as a vehicle to make directed procurements nor should they otherwise be used to avoid agency internal management controls.

D. Good Procurement Practice and Accountability

1. Is there time to ensure that normal procurement practices are followed?

2. A cost or price analysis, and a determination that the Government is paying only fair and reasonable prices and will receive all appropriate discounts and credits, should be made for all contracts or modifications.

3. All noncompetitive proposals should be audited or audit information obtained, unless reasonableness of price can be established clearly by other means.

4. Certification of current cost or pricing data should not be used as a substitute for preaward price negotiation.

5. Initiation of procurements in the fourth quarter for award in the fiscal year should generally be limited to small purchases or to emergency unscheduled requirements.

E. Standards of Conduct

1. Have employees been advised of the standards of conduct as they apply to wasteful spending and the possible sanctions and penalties?

2. Have employees been apprised of waste and fraud hotline telephone numbers and the protections that are available to employees making waste and fraud reports?

3. Funds should not be transferred to other agencies to avoid funds lapses.

4. Contracts or other documents must not be post dated.

5. Procurement actions should not be delegated or assigned to field or base stations, regional or other subordinate offices or other activities or agencies, nor should any other action be taken, to avoid proper review, clearance, approvals or other such internal controls.

6. Contracts to former Government employees must be closely reviewed and clearly justified.

OFFICE OF THE UNDER SECRETARY OF DEFENSE
WASHINGTON, D.C. 20301

RESEARCH AND
ENGINEERING

24 AUG 1981

MEMORANDUM FOR Assistant Secretary of the Army (RDA)
Assistant Secretary of the Navy (S&L)
Assistant Secretary of the Air Force (RD&L)
Director, Defense Communications Agency
Director, Defense Intelligence Agency
Director, Defense Logistics Agency
Director, Defense Mapping Agency
Director, Defense Nuclear Agency
Director, National Security Agency

SUBJECT: Procurement Procedures, Advance Procurement Planning, and Review of End-of-Year Purchases

The enclosed Policy Letter 81-1 from the Administrator, Office of Federal Procurement Policy (OFPP), dated August 13, 1981, is forwarded for action. It requires that procurement management controls be established to reduce wasteful practices resulting from hurried or unnecessary end-of-year procurement.

In furtherance of this direction, I request that you issue instructions immediately to all of your procurement organizations stressing the need for managers at all levels to institute controls to avoid wasteful practices in hurried end-of-year procurement. Every possible effort shall be made to avoid any deviation from prescribed policies and procedures or sound practices for the purpose of obligating funds that will expire at the end of the fiscal year.

Your instructions should incorporate the specific guidance provided in the enclosed OFPP Policy Letter as described below:

1. Procurement procedures providing lead time and cutoff dates. Procedures at each purchasing office shall specify the lead time required and establish firm cutoff dates for submission of requests for contract action to be completed by the end of the fiscal year.

2. Advance procurement planning. DAR, Section I, Part 21, satisfies the general thrust of this requirement. In addition, special attention shall be given to requirements with potentially high waste vulnerability, such as consulting services, certain equipment, periodicals, pamphlets, or audiovisual products.

3. Review procedures for last quarter spending. Procuring activities shall develop review procedures consistent with the direction provided in the enclosed OFPP Policy Letter.

4. Contract action log. Each purchasing office shall keep a log of major or high waste vulnerability contract actions.

Please provide this office with a copy of your implementing instructions.

R. F. Trimble

ROBERT F. TRIMBLE
ACTING DEPUTY UNDER SECRETARY
(ACQUISITION MANAGEMENT)

Enclosure

ENCLOSURE 2

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

OFFICE OF FEDERAL
PROCUREMENT POLICY

AUG 13 1981

POLICY LETTER 81-1

TO THE HEADS OF EXECUTIVE DEPARTMENTS AND ESTABLISHMENTS

SUBJECT: Procurement Procedures, Advance Procurement Planning, and Review of End-of-Year Purchases

It is the responsibility of the head of each agency to assure efficient and economical procurement. Consistent with that responsibility is an obligation to reduce wasteful practices resulting from hurried or unnecessary end-of-year procurement. In carrying out these responsibilities, the Head of each Executive Department or Establishment shall establish the following management controls:

1. Procurement procedures providing lead time and cut-off dates. Each agency shall develop procedures that allow sufficient lead time to prepare solicitations, obtain and evaluate bids or proposals, audit, negotiate, and make contract awards in an orderly manner. The procedures shall specify the lead time required and establish firm cut-off dates for submission to procurement offices of requests for contract action to be completed by the end of a fiscal year. The lead times and cut-off dates may vary with the type of contract action and dollar thresholds. Exceptions to the lead time and cut-off date procedures should be kept to a minimum and approved only under extraordinary circumstances.

2. Advance Procurement Planning. Agencies shall issue procedures that require an Advance Procurement Planning System (APP) for each activity. The procedures shall include:

   - Establishment of a specific threshold above which procurements are to be considered major;

   - Development and maintenance of an advance procurement plan to cover major procurement requirements and other requirements with high waste vulnerability, such as consulting services, certain equipment, periodicals, pamphlets, or audiovisual products. The plan should be developed well in advance of the fiscal year in which the acquisition will be made;

- Flexibility to allow revisions to the plan, but only to reflect budget changes, emergencies, and changes in program direction;

- Procurement planning that begins concurrently with the agency budget process;

- A requirement that needs are specified in a form that permits effective competition and innovation;

- A means to resolve disagreements between procurement and project offices;

- Close control of major and high waste vulnerability purchases to assure that they are consistent with the advance procurement plan; and

- An ongoing program to assess the appropriateness of the methods used to satisfy needs, including cost effectiveness, whether gold-plating will result, and life cycle costing, where appropriate.

3. Review procedures for the last quarter spending. Each agency shall develop review procedures that require: (a) close control of purchases made in the last quarter to assure that they are consistent with the advance procurement plan, (b) reevaluation of the need for purchases made in the last quarter, (c) good procurement practice and accountability to assure that contracts are awarded only if prices are reasonable, and (d) award of contracts on the basis of competition unless award on some other basis is significantly to the advantage of the agency.

4. Contract Action Log. Each procuring activity shall keep a log of major or high waste vulnerability contract actions.

Within 60 days after the effective date of this letter the head of each agency shall report to OFPP the action taken to implement the provisions of this Policy Letter. The report shall describe the advance procurement planning process, the procedures to require lead time and cut-off dates, the review procedures, and the implementation of the contract log.

For further information with respect to this policy directive, contact Mr. Jack Nadol, Assistant Administrator for Procurement Practices, telephone 395-3455.

EFFECTIVE DATE: This Policy Letter is effective August 28, 1981.

CONCURRENCE: This letter has been concurred in by the Director of OMB.

Donald E. Sowle

Donald E. Sowle
Administrator

Ms. Gilleece. If I might change the subject for a moment back to what you indicated before was your concern regarding procurement. Let me reaffirm what I was stating which is that we absolutely appreciate your focusing on procurement reform.

We recognize that the administration has suported an increased defense budget. We will continue to support an increased defense budget. What that also means is that we had better be buying those products in the best way we know how and the 1947 statute, which is not dynamic at this particular time, certainly needs some changes.

What we are here to talk about is your concern and our recommendations to your concern. Let us not lose sight of our support for your efforts.

Senator Cohen. Thank you very much.

I would point out one thing that is overlooked many times is that we in Congress contribute a great deal to the delays in spending of dollars during the course of the year since many times you do not have an appropriation bill, if ever, during the course of the year and many times not until September.

It makes planning very difficult. It is not as if we are up here preaching from a pulpit which is 99 and $^{44}/_{100}$ths pure. We cause a lot of our problems in cost overruns. We cause a lot of problems in the delay of weapon systems. We start them, we slow them down, we cancel them, we restart them.

So, we have a lot of blame to shoulder up here. I offer in that regard we should make changes to deal with practices which contribute to hurry up spending because we don't have adequate planning.

I recall from the hearings several years ago, for example, the EPA had a fairly good system that was totally unknown to OMB or anybody else in the Government. They had a good system of trying to plan ahead in terms of how much would be required, how to contract that out and how to have a more uniform expenditure of funds.

You mentioned all the contracts, 13 million actions per year. You have a lot of people involved. There are a lot of technical aspects to it. It is big and complex. We have a very limited timespan and attention. Usually we are running 1 hour and then off to another committee.

One of the reasons why there has not been any movement is because we have not been persistent in our efforts to see if we can't change things. Even if we make changes, we find they have become so encrusted with exceptions that the exceptions become the rule and we end up almost with a handful of dust.

Senator Levin?

Senator Levin. Mr. Chairman, I have a number of questions that I would like to ask for the record.

I, of course, along with the chairman and other members of the committee, have been deeply concerned for a long time about the procurement practices of the Department of Defense and a number of other departments. I am convinced to try to change those practices is one of the most difficult tasks we face just because of the departmental inertia. It is tough to change things, but we have to continue to try.

In that regard we have welcomed the help of the Inspector General of DOD, the GAO, the Defense Contract Audit Agency and others in that effort to try to produce some reform so that we can change the way we do business.

I tell you there is a recurrent theme out there. I just came back from my State over the weekend and they continually tell me that they don't like what they read about defense procurement practices. I keep telling them of the good, wonderful reforms we are trying to do here, Mr. Chairman, and I wish they could see some of the difficulties that beset us as we undertake this effort.

I have first a question, though, of the GAO. One of the provisions of the bill before us is a requirement that there be publication of the intent to award a sole-source contract and that there be a 30-day notice prior to the award of the contract with a number of exceptions where inappropriate to delay even for 30 days.

Do I understand from your testimony that the GAO supports that particular provision in the bill?

Mr. GILROY. Let me refer to Mr. Tansey for that.

Mr. TANSEY. That is right, we would support that.

Senator LEVIN. Why do you support that provision?

Mr. TANSEY. The main purpose of the notice provision is to serve as a double-check to make sure that there are no other sources out there under the first exceptions in the bill, that is the exception that would apply when the agency claims only one source is available to do the work.

Under that exception you would have to use the notice. On the others the reasons involved would not require notice.

Senator LEVIN. In other words, there may be a whole lot of contracts which escape any notice unless there is this fail-safe?

Mr. TANSEY. That is right. In our work we have found that to be the case. Often agency officials will decide sole source is appropriate and there is no market research at all, there is no notice inviting competition placed in the Commerce Business Daily, so the award is made noncompetitively when sources are out there able and willing to do the work.

Senator LEVIN. Do you believe 10 days are enough for those potential competitors to respond?

Mr. TANSEY. I am not sure I understand. The bill provides for 30 days plus an initial 15 days before the solicitation is issued.

Senator LEVIN. There was a proposal some time back to reduce that to a 10-day period.

Would you agree we should keep the 30 days intact?

Mr. TANSEY. Thirty days seems reasonable. We found that the biggest problem was no notice inviting competition was being placed in the Commerce Business Daily at all. We constantly hear complaints that 10 days is insufficient. So the small business community would like to see a longer period of time. Certainly if the notice is published and invites competition, that seems to resolve the biggest part of the problem.

Senator LEVIN. I think we have heard from DOD on their objection to this provision. Have we had testimony on that issue?

Ms. GILLEECE. Yes, Senator.

Senator LEVIN. I won't duplicate that.

I would like to ask for the record a number of questions of DOD relative to the question of pricing data—whether we should return to the $100,000 threshold.

On that issue, Mr. Chairman, I think it would be very useful for us to hear from the Inspector General of the DOD and from the Defense Contract Audit Agency who I understand both support the return to the $100,000 threshold. I am wondering whether we might invite them up on Thursday or in some other way have their testimony made part of the record.

Senator **Cohen**. Either they could appear or we could get a written statement from them on this.

Senator **Levin**. I would like to ask the Secretary a question. I gather if we keep the $500,000 threshold that we will pick up a great percentage of the dollars that we recapture through this process.

Is that basically your testimony, that by leaving out the contracts under $500,000 that we nonetheless get 80 or 90 percent of the dollars that are owing anyway?

Ms. **Gilleece**. Ninety-two percent.

Senator **Levin**. Do you know in terms of cost-benefit whether or not we recapture more dollars than it cost us if we go back to the $100,000 threshold?

Ms. **Gilleece**. There is no definite evidence. I suggest to you that we certainly have relieved the administrative burden on not only the contractor, but also the Government. That has been a clear focus in the last few years. We should try to make the contracting process simpler and easier where appropriate and this was one of the suggestions.

Senator **Levin**. Have you done a cost-benefit analysis of how many dollars you would pick up for each dollar of investment administratively if we go back to the $100,000 threshold?

Ms. **Gilleece**. I am informed that the benefit below $500,000 has been a 20 to 1 return whereas above $500,000 it has been a 132 to 1 return.

Senator **Levin**. For every dollar we invest between $100,000 and $500,000 we get back $20?

Ms. **Gilleece**. These are not the figures provided by my office.

Senator **Levin**. I just want to make sure I understand your answer. Is it your understanding for every dollar we invest we get back $20 between the $100,000 and $500,000 threshold?

Ms. **Gilleece**. It is my understanding there was testimony to that effect before the Senate Governmental Affairs Committee.

Senator **Levin**. It is not your own?

Ms. **Gilleece**. It is not our evidence.

Senator **Levin**. Do you have any evidence on the cost-benefit ratio?

Ms **Gilleece**. No, sir, we do not. The figures that we provided to you just now are from the Defense Contract Audit Agency.

Senator **Levin**. DCAA has come up with those figures?

Ms. **Gilleece**. Yes.

Senator **Levin**. Does GAO have figures on that issue, cost-benefit return if we return to the $100,000 threshold?

Mr. **Gilroy**. The figures we have we also obtained from DCAA who conducted studies to show the ratio that Ms. Gilleece is referring to.

Senator Levin. So you would support the 20 to 1 return as accurate?

Mr. Gilroy. Yes.

Senator Levin. Do you support return to the $100,000 threshold?

Mr. Gilroy. Yes, we do.

Senator Levin. Why do you?

Mr. Gilroy. We have seen, as we discussed earlier, Senator, we have seen no real season to go to $500,000. We do not buy into the argument that the paperwork burden would be such that it would be a turnoff to return to the $100,000. We feel it is a deterrent.

The significant savings that the DCAA has reported in the range of $100,000 to $500,000 to us is overwhelming evidence that it is worthwhile to audit in that area, and we are saying preward now, meaning that the cost on pricing data that is prepared by, I would guess, any contractor who has to bid. He has to prepare cost on pricing data.

What we are talking about is contractor certification as to currency, accuracy and completeness and this be made available to auditors. For all these reasons we believe that the threshold ought to be returned to $100,000.

Senator Levin. Is that data furnished by the contractors in any event? Is it just a certification that is at issue or what data has to be submitted?

Mr. Gilroy. It is a combination. It is certifying and making data available. The contracting officer can request this data.

Ms. Gilleece testified to something earlier that we would agree to, that often a contracting officer, if there has been repeatedly provided a product and it is a price that has been proven and audited and it is the contractors coming in with accurate current data, that probably DCAA would not be called in to audit. This is a norm. We have no argument with that.

Senator Levin. Let me go back to my other question.

Is this an additional burden on the contractor?

Mr. Gilroy. We don't find it is an additional burden. We find the same information would be present whether there is an audit or not.

Senator Levin. The same information would be present in our files or their files?

Mr. Gilroy. In the contractor's files.

Senator Levin. So when we ask for certification if we go back to the $100,000 threshold, we will be asking for certification of the accuracy of data which is already in their files?

Mr. Gilroy. Yes.

Senator Levin. In terms of cost to us is there evidence in the DCAA that for every dollar we invest we get back $20 between the $100,000 and $500,000 threshold?

Mr. Gilroy. Those are the figures.

Senator Levin. Do you have any reason to challenge their 20 to 1 figures?

Ms. Gilleece. The only thing I might add is that our procurement officials are a very professional work force. In the preaward analysis they would have identified most of the questionable items in any event without audit.

Senator Levin. Isn't that true for above $500,000 as well?

Ms. Gilleece. Absolutely.

Senator LEVIN. So why do anything different between $100,000 and $500,000 then we do for over $500,000?

Ms. GILLEECE. For the reason that we are relieving the administrative paperwork burden under $500,000 reasons the $100,000 threshold was established in 1962.

Senator LEVIN. I understand that. I thought you just said that the contracting officer could identify it anyway without the certification.

The question is why certify over $500,000?

Ms. GILLEECE. Under the 20 to 1 ratio you are talking about in DCAA, the contracting officer would have most probably identified the majority of those savings that are identified by DCAA without audit.

Senator LEVIN. I think we may be going in circles. That would also be true for over $500,000, would it not?

Ms. GILLEECE. That is correct.

Senator LEVIN. That would not give us any justification for differential in the rule between 100 and 500 or over 500?

Ms. GILLEECE. Nor is the 20 to 1 ratio.

Senator LEVIN. That ratio is good evidence that for every nickel we invest we get back a dollar.

Ms. GILLEECE. You already have the contracting officers there to identify that. Why put an additional person in that?

Senator LEVIN. Because GAO has told you if we require certification, we will have a deterrent and we will collect $20 for every $1 we invest.

Is it for every additional $1 we invest we get back $20?

Mr. GILROY. We have said the 20 to 1, whether it is 20 or 25 to 1, is a figure that came from DCAA. We have said we accepted DCAA's analysis of what their return was for time invested.

Senator LEVIN. Does DOD accept that DCAA is accurate?

Ms. GILLEECE. With explanation.

Senator LEVIN. You consider DCAA part of the agency?

Ms. GILLEECE. Part of the Department of Defense.

Senator LEVIN. Do you have reason to disagree with their 20 to 1 cost-benefit analysis?

Ms. GILLEECE. Excuse me just a moment. Mr. Gordon who testified at the time DCAA did, and Mr. Trosch, our counsel both wish to comment.

Mr. TROSCH. If I could go back for just a moment. What we are talking about is the requirement to submit cost or pricing data. The statute now says that it must be submitted for every noncompetitive negotiated contract over $500,000. It used to be $100,000.

It doesn't say that if the requirement isn't there, the contracting officer can't ask for it. Many contracting officers on particular procurements below $500,000 do ask for it.

The only question then is should it be required in cases where the contracting officer doesn't ask for it. We are talking about the preparation of the submission that the contractor is going to have to make where the contracting officer feels he does not need it.

I think GAO just agreed with us a few moments ago that there would be certain situations, particularly in repetitive procurement, where it was not necessary from the viewpoint of the contracting officer to require the data be prepared and submitted by the contractor.

The preparation and the submission of that data also involves cost. I believe the issue that you were discussing about the 20 to 1 figure on return on audit effort merely dealt with audit cost on the part of DCAA.

I did not really go into the cost to the contractor or the cost to the Government to provide the data which the contracting officer does not feel is necessary for purposes of pricing. Because the statute says you must get it in this case, they are going to get it.

I think Mr. Gordon wants to comment.

Senator **Levin**. Is it also true there are some contracts over $500,000 where the contracting officer would not feel it necessary to have data?

Mr. **Gordon**. Yes.

Mr. **Trosch**. I think it is true. There certainly would be contacts over that where dots would not be necessary.

Senator **Levin**. But we require it anyway?

Mr. **Trosch**. We require it anyway just as in 1962. There were probably instances over $100,000 at that time, but we required it anyway. In establishing the threshold one is going to make judgments as to where you want to catch the majority of the cases and a judgment was made in 1962 when Public Law 87–653 was first enacted that a good place to establish the threshold was at the $100,000 level. Now, after a substantial amount of time and a substantial amount of inflation, the Congress 2 years ago raised the threshold to $500,000. In the Department's view this was appropriate.

Senator **Levin**. Does that reflect inflation between 1962 and 1982, 500 percent?

Ms. **Gilleece**. Two years ago when we dealt with the legislation it was almost $400,000 at that time.

Senator **Levin**. Let me ask you this question about what you call repetitive procurement.

It has been certified to once. What is the big deal in requiring it be recertified? Why is that a big problem?

Ms. **Gilleece**. Individually nothing is a big problem for the Department. What we are trying to do, however, is simplify the process. The accuracy, currency and completeness of the certified statement must be on each instant procurement. Therefore that which was certified 6 months ago presumably would not be current.

What we are suggesting is that the contracting officer, the professional within the organization, would be able to determine whether the proposal by the contractor was appropriate as far as the cost or pricing of that proposed contract.

If the contracting officer has reason to believe that based upon his experience and knowledge that the proposal from the contractor is incorrect, he may then ask for certified cost or pricing data for anything under $500,000.

Senator **Levin**. He can do that for contracts over $500,000; is that right?

You keep saying the contracting officer can always do it if he is interested in asking for the information without requiring the certification. The answer is he can do it for over $500,000.

Ms. **Gilleece**. The difference is that over $500,000 it must be submitted.

Senator **Levin**. The question is whether we want it required to be submitted for between $100,000 and $500,000. You are saying the contracting officer can ask for it. I come back and say he can ask for it for over $500,000.

Your answer is that is where we draw the line.

Ms. **Gilleece**. There are those who probably support having no certified cost on pricing data. There are those who support it at a million dollars. The fact is the decision was made to increase it to $500,000. It had administration support. It had congressional support at the time. That is why the current law is set at $500,000.

Senator **Levin**. What is really intriguing to me is who it is supporting to go $500,000 and the GAO and DCAA are the ones that I think we should look to for direction in terms of tightening up these procurement practices. The Inspector General and GAO recommend the return to the $100,000 figure. I think that is very significant coming from them.

The resistance on the part of the Defense Department to collecting $20 for each dollar invested because if we invest a dollar somewhere else, we will collect $900 or $1,000 to me is absolutely illogical. If I can get a $20 return for every dollar invested, I would do it. If I get a $100 return for a dollar invested somewhere else, I will do that, too.

You are not short of dollars to recoup money due us from contractors. As a matter of fact, we produce money for the defense budget if we go back to the $100,000 level because we collect $20 for every dollar we invest and you will have $19 for other needed portions of the defense budget.

Mr. **Gordon**. I think the statement by DCAA that they recoup $20 for every dollar invested does not apply for the dollar threshold certification for cost on pricing data.

What they said is to the extent they devote $1 of effort on the contract, their experience suggest that on contracts below $500,000 they generally wind up questioning costs amounting to $20. Whereas for every dollar invested in contracts over $500,000 they question $132 worth of costs. Whether we have certification or not, we have audit assistance below $500,000.

I am not suggesting we don't use audit assistance below $500,000. The point is, if you are going to have a certificate then it is awful dumb to require it and not have an audit. This means we are going to mandate all audits between $100,000 and $500,000 on all contracts.

That means a lot of audit effort where we get less return for our dollar than otherwise, and our resources are finite. We don't have an unlimited number of auditors. If you use audit assistance at this lower dollar value contract, you don't have auditors available to negotiate the bigger dollar value contract or it takes longer to get the audit accomplished.

Senator **Cohen**. Just one point in response to what you are suggesting.

The fact you might require contractors to certify the accuracy of data between $100,000 and $500,000 does not mean you are going to mandate you have an audit done for all of those contracts.

What it does mean is that if the Government seeks to recover money because of the defective pricing, they don't have to go to court to do it. They have a document which says you certified this as accurate, complete, and current.

Without certification what it means is you have to go to court to recover the lost cost. That means years of litigation, it means more cost. It does not mean you necessarily have to mandate you have to audit every single contract, but in the event they pick and choose selected contracts to audit, they already have certification which is prima facie evidence they have not complied with the truth in negotiation requirements.

Mr. GORDON. That is absolutely correct. The point is, when we checked with DCAA, we did not find they customarily went back to these contracts to do a post award audit. They didn't find it cost beneficial.

We did find that there was a propensity on the part of the buyer that if we asked for certified cost on pricing data he was going to ask for audit assistance. We found that the audit threshold and requests invariably tied in and tracked very closely with the dollar threshold for certification.

We found we were spending a lot of audit time in an area where we were getting results, but disproportionately not as much leverage in our investment as we got with the big bucks.

Senator COHEN. As they say on one television program, you have the last word because it is now the hour of 12:30. We will adjourn until Thursday when we will continue with the hearings.

Thank you all.

Senator LEVIN. In light of this testimony about DCAA, however, I would like to urge, if possible, that we have them here to testify, if they are available rather than just get a statement from them.

[The questions submitted for the record follow:]

QUESTIONS SUBMITTED BY CHAIRMAN JOHN TOWER

Senator TOWER. Mr. Gilroy, how specifically would you recommend that the Committee deal with unsolicited proposals?

Do you believe that a sole-source exception for innovative or novel proposals would be appropriate?

Mr. GILROY. We do not believe that a specific exception to the requirement to use competitive procedures should be added for innovative or novel unsolicited proposals. However, we suggest that title II, section 2305(c)(3) of the bill be revised to exempt agencies from conducting market research and publicizing a preaward notice in the Commerce Business Daily in those cases when these procedures cannot be performed without disclosing the unsolicited proposer's original thoughts, innovative approach, solution, or other proprietary information. Based on our reviews of contracts resulting from unsolicited proposals, we believe that agencies can with relatively few exceptions undertake such a market search for competitive sources to meet the Government's minimum requirements without disclosing such data. Such a market search that identifies the Government's needs or the problem to be solved (but not the proposer's solution, unique ideas or other proprietary information) may well elicit alternative approaches that are technically superior or more cost effective than that encompassed by a single unsolicited proposal.

Senator TOWER. Mr. Gilroy, why do agency officials typically fail to compete contracts that ought to be competed?

Mr. GILROY. The major factors we have identified as to why agency officials fail to obtain competition on awards that could have been awarded competitively are (1) ineffective procurement planning or the failure of contracting officers to perform market research adequate to ensure that sole-source procurement was appropriate (including proper use of the Commerce Business Daily) and (2) inappropriate reliance of procurement officials on the unsupported statements of agency program, technical, or higher-level officials. In addition, a lack of commitment to competition on the part of key agency personnel has been a major problem. Instances of overly restrictive specifications and failure to use available data packages to obtain competition have also been found.

Chairman **Tower**. Mr. Gilroy, based on the studies that GAO has done on competition in contracting, do you think that this legislation will substantially increase competition?

Mr. **Gilroy**. We believe S. 338 provides needed changes and reemphasis that should, if properly implemented, substantially increase the amount of procurement dollars awarded under competitive conditions. However, if certain suggested revisions to S. 338 are accepted, we would not expect this same result. For example, (1) elimination of the bill's preaward notice provision or (2) adoption of additional exceptions to the use of competitive procedures, such as one for unsolicited proposals or a broad catchall exception without proper safeguards, would likely negate S. 338's objective of limiting unnecessary noncompetitive contracts.

PRESENT STATUTORY LANGUAGE

Senator **Tower**. You generally argue for preserving present statutory language, even if the content is slightly different from that in S. 338. Is it particularly important in your view that the present language be maintained?

Ms. **Gilleece**. A considerable body of judicial as well as GAO precedent has arisen over the last 36 years concerning the Armed Services Procurement Act. Much of it interprets the actual language of the Act. It is this precedent that assists those who must use the statute in interpreting its terms. However, when the language of a statute is changed the prior precedents are of little value in interpreting the new language. Therefore, unless existing language is causing problems, it should be retained. Otherwise, there will be those who will argue that Congress changed the language to deliberately abandon the prior precedents and that the new language, even if similar, embodies new concepts. Unfortunately, such arguments are often the basis of protracted and unnecessary litigation to build a new body of precedent.

RESALE COMPETITION

Senator **Tower**. What is the position of the Department on items that are purchased for resale, such as in commissaries? Should there be an exception from competition for such items?

Ms. **Gilleece**. Brand name items for commissary resale are not susceptible to competition to any great extent. Where it is possible to compete effectively between distributors and manufacturers, it is done. However, to satisfy customer preferences, almost all brand name products must be acquired noncompetitively. Under S. 338, DoD would have to acquire such items under the first exception to competition, ". . . available from only one source and no other type of property or services will satisfy the needs of the agency." This, of course, would be subject to the synopsis requirements now contained in S. 338 and points up just one type of action that would be subject to delay to "flush the market" when no other sources are known to satisfy retail customer desires for that brand name item. A separate exception for commissary resale items was not requested by DoD since the first exception would suffice if the synopsis provisions of S. 338 were deleted as suggested.

FOLLOW-ON CONTRACTS

Senator **Tower**. You have indicated some concern that S. 338 would require competition for follow-on contracts of major weapons systems. The report from the Committee on Governmental Affairs specifically says that follow-on contracts need not be completed. In light of the report, do you think there's a problem?

Ms. **Gilleece**. The report explains at page 21 that the first exception to competition contracting under S. 338 can be used in some but not all "follow-on" contracts. The use of this exception under S. 338 now requires the requirement to be synopsized with responses to be considered. This is extremely burdensome leading to procurement delays in situations apparently recognized by the bills' drafters as legitimately noncompetitive. Also see answer to question on page 127 line No. 16.

GENERAL EXCEPTION

Senator TOWER. You have requested a general exception from competition when the head of the agency determines that it is necessary to award a contract on other than a competitive basis. If the other exceptions in this bill are complete, why then do we need a general exception?

Ms. GILLEECE. Although we concur with the concept of a statutory preference for competition with noncompetitive awards being authorized in only limited circumstances, we are concerned that we are simply not knowledgeable enough to know what circumstances may arise in the future (that we are currently not aware of and cannot predict) which would require use of noncompetitive procedures. Our exception (9) is intended for this narrow purpose, and to assure that it is not abused we are suggesting language that would require high level approval in order to utilize the authority.

NOTICE

Senator TOWER. What is your position on Commerce Business Daily notice requirements? What specifically are the problems that you have with the provisions on this subject in S. 338?

Ms. GILLEECE. We support the publication of procurement information. More than 70 percent of all actions over $10,000 are now synopsized within DOD covering about 85 percent of new procurement actions. The present law, section 8(e) of the Small Business Act, as implemented by DOD, is effective in publicizing the vast majority of procurements without unduly delaying the procurement function, thus, impacting mission requirements.

QUESTIONS SUBMITTED BY SENATOR DAN QUAYLE

SPARE PARTS

Senator QUAYLE. Why is it that less than 10 percent of spare parts are procured competitively?

Ms. GILLEECE. Of the approximately 2 million spare parts screened under the breakout program about 600,000 parts are coded for competitive procurement or 30 percent. We are not satisfied with this level of competition and will seek to improve it.

Senator QUAYLE. How does S. 338 as reported by the Committee on Governmental Affairs or as you recommend it be amended, contribute to increasing competition in procurement of spare parts?

Ms. GILLEECE. The bill with our revisions will emphasize competition and reduce the current administrative paperwork dealing with negotiation exceptions. We believe these are constructive changes that will enhance effective and efficient procurement for spare parts.

Senator QUAYLE. S. 338 uses the term "effective competition" (see, for example, lines 7–8 and 14 on page 22 of S. 338). Would it not be better to use the term "maximum practical competition" to insure that competition is not limited to as few as two sources, which could be only the prime and the existing subcontractor?

Ms. GILLEECE. Competition among suppliers is necessary to maintain integrity in the expenditure of public funds. However, the phrase "maximum practical competition" equates to the current statutory requirement for full and free competition, as exemplified by formal advertising, which has been interpreted to require consideration of all sources in every procurement. This is not necessary either to ensure integrity in the process or to obtain reasonable prices.

The problem with "maximum practical competition" is that the contracting officer has little or no control over the number of prospective bidders who may respond to a given requirement. There are countless instances in which dozens of bids are received for a prospective contract that may only be, for example, $30,000. The Government may spend more in paperwork and resources to evaluate and make such an award than the value of the contract itself. The bidders, in turn, spend many times over what it directly costs the Government.

The Government has an obligation to spend the taxpayer's money wisely and efficiently through the procurement process. It should be able to purchase, like any other user, prudently, soliciting an adequate number of suppliers commensurate with the need to be filled. In short, it is not reasonable to invite, perhaps, hundreds of suppliers to bid on a contract where the cost to society is more than the value of the contract.

Senator QUAYLE. Doesn't the proposed new DOD spare parts breakout regulation do very little to really encourage competition in that it contains a complex 69-step set of procedures that must be followed before a spare part is put out for competitive bid?

Ms. GILLEECE. The full screening decision process involves 65 steps, which may appear to be complex. The full process identifies a number of conditions that could effect breakout. Few parts must be subject to every step to reach a final decision. Accomplishing any one step may be difficult in some cases. The 65 steps are like a management decision tree. If the decision is positive in key steps, only 20 steps are involved to reach a final conclusion to breakout to competition.

Senator QUAYLE. What does DOD propose to reduce the following barriers to competition: (1) bidder and product prequalification; (2) inadequate and untimely notification of procurement actions; and (3) lack of access to technical data packages needed for competitive procurement? Would you recommend amendments to S. 338 or would you support separate legislation to deal with these problems so we can get real competition in the procurement of spare parts?

Ms. GILLEECE. (1) A very small number of spare parts are of such critical nature that manufacturer or product qualification is necessary. These programs are closely controlled by the DOD data management system, which specifies detailed criteria and instructions. We will continue to monitor and review these programs to limit barriers to competition as much as possible. (2) Current law and implementing regulations prescribe timely and adequate notification of procurement actions. We acknowledge that this one needs continued attention and emphasis. (3) It is our policy to provide technical data packages where the Government has a legal right to use the data for procurement, as part of the solicitation. While distribution is based on potential bidders and inquiries, any small business will be given a copy upon request.

We do not support any separate legislation on these matters. Existing legislation, in our opinion, is adequate.

Senator QUAYLE. The National Tooling and Machining Association has the equipment configurations of all its members on computer and could link its computer system to any contracting officer or procurement center so that a large number of potential bidders could be identified for each spare parts procurement. Would DOD and the Military Services be willing to work with NTMA to determine how this system could be used to achieve greater competition in an area that is currently very non-competitive?

Ms. GILLEECE. DOD has reviewed with National Tooling and Machining Associations their membership equipment listings. We have recommended that they discuss their system with several major hardware centers. Their listing may be helpful to engineering support and industrial specialists in identifying sources. However, in its present form we do not believe it useful to the contracting officer. If a member of NTMA desires to bid on Government procurements, it should complete the bidders request form for inclusion on the bidders list.

QUESTIONS SUBMITTED BY SENATOR HENRY JACKSON

UNSOLICITED PROPOSALS—SOLE-SOURCE PROCUREMENTS

Senator JACKSON. Mr. Gilroy, the Governmental Affairs Committee report on S. 338 states that "unsolicited proposals often actually are solicited by the agencies." The implication seems to be that such unsolicited proposals become the basis for sole-source contracts.

Has GAO investigated the use of unsolicited proposals in the Department of Defense (DoD), and DoD contracts resulting from such proposals?

If so, what were GAO's findings with respect to the incidence of sole-source contracts resulting from unsolicited proposals?

In GAO's judgment, how many of those sole-source contracts were susceptible to be competed?

Mr. Gilroy. Two of our major reviews performed within the past few years included investigation of the use of unsolicited proposals in DOD. In our review of DOD's management support service contracts we found that 40 percent of the 256 randomly selected contracts reviewed were based on unsolicited proposals. We stated that, although unsolicited proposals should not be discouraged, all too often they have been used to (1) subvert the competitive process, (2) encourage work that may not be important relative to DOD's mission needs and priorities, (3) abrogate DOD's responsibilities over the scope and direction of work related to defense management, and (4) perform work that is not truly unique or innovative (GAO/MASAD-81-19, dated March 31, 1981.)

As part of our review of DOD noncompetitive contracts for all types of goods and services (GAO/PLRD-81-45, dated July 29, 1981), four of the randomly selected contracts we reviewed were unsolicited proposals awarded by the Defense Nuclear Agency (DNA). All four could have been awarded under competitive conditions and neither the noncompetitive justifications, nor the technical evaluations, nor the market analyses were adequate. None of the contracts were justified as noncompetitive because of the proprietary nature of their unsolicited proposals. In addition, all four contracts involved contractors starting work before the contracts were signed (early starts). This made it difficult for contracting officials to solicit additional contractors.

Furthermore, we found that in fiscal year 1979, DNA awarded 781 of its 795 new contracts noncompetitively to "selected sources." The vast majority of these were early starts and awarded from unsolicited proposals. DNA's handling of these contracts violated the intent of DOD guidance on competition.

When unsolicited proposals are inappropriately awarded sole source—as they were in these contracts—opportunities for competition are lost. For example, DNA awarded a sole-source contract valued at $49,698 for the compilation and summarization of documents (a literature search) on the effects of electromagnetic pulse on command, control, and communication systems. The need for the service arose out of a change in DNA's Information System Division. After the change, DNA received the proposal to compile and summarize certain technical documents. Although DNA stated the proposal was unsolicited, the contractor could not remember who initiated the idea.

Drawing from DNA's contractor pool, we discussed the contract's requirements with representatives from four other firms, all of whom stated that they would have been interested in reviewing the Government's needs. In fact, one firm had already developed a comparable compilation for similar use.

A DNA official stated that it would be presumptuous to assume that no other firm would be interested in the work, but if officials know a firm can do the job it has proposed, they usually award the contract to that firm without checking other sources. This implies that an unsolicited proposal will be accepted if DNA believes the contractor can do the work. DNA does not require that a proposal contain proprietary ideas or that the offeror have unique capabilities.

Based on our reviews of unsolicited proposals in DOD as well as major civilian agencies, we believe that agencies can with relatively few exceptions undertake a market search for competitive sources to meet the Government's minimum requirements without disclosing the unsolicited proposer's original thoughts, innovative approach, solution, or other proprietary information. As suggested in our testimony, we would clarify S. 338's requirements for market research and preaward notices in the Commerce Business Daily on unsolicited proposals. We believe that competitive proposals could be obtained for many of the Governments requirements that are now procured noncompetitively based on unsolicited proposals.

IMPACT ON CERTAIN UNSOLICITED PROPOSALS

Senator Jackson. Mr. Gilroy, various educational institutions have communicated with the Committee concerning the impact of S. 338 on generation of unsolicited proposals, especially for basic research. The concern expressed has been that the requirements—albeit that they are limited—to conduct a market search in connection with unsolicited proposals would have a chilling effect on the generation and submission of such proposals.

Do you agree that such an effect could occur?

If not, why not?

Mr. Gilroy. S. 338 would not really change the present requirements relating to obtaining competition on unsolicited proposals. Under the present procurement statutes, unsolicited proposals are not exempted from competitive requirements when competition is feasible. For example, the Defense Acquisition Regulation (DAR 4-910) states that:

A favorable comprehensive evaluation of an unsolicited proposal is not in itself, sufficient justification for negotiating on a noncompetitive basis with the offeror.

When a document qualifies as an unsolicited proposal but the substance (1) is available to the Government without restriction from another source, or (2) closely resembles that of a pending competitive solicitation, or (3) is otherwise not sufficiently unique to justify acceptance, the unsolicited proposal shall not be acceptable.

When procurement is intended and competition is feasible, the proposal shall be returned to the offeror together with the reasons for the return.

NASA's procurement regulations and the Federal Procurement Regulations, which cover procurement by the civilian agencies, contain similar provisions.

S. 338 would continue this approach by permitting the use of noncompetitive procedures when competition is not feasible on unsolicited proposals. That is, title I, section 303(e)(1) and tiitle II, section 2304(e)(1) permit agencies to use noncompetitive procedures when "the property and services needed by the Government are available from only one source and no other type of property or services will satisfy the needs of the executive agency."

In our work on unsolicited proposals we identified a large number of noncompetitive contracts, including those for basic research, where the use of contracts was not appropriate at all. If funding was appropriate, it should have been provided through grants or another assistance instrument, in accordance with the Federal Grant and Cooperative Agreement act of 1977. We believe that if the Congress wishes to increase funding for basic research, it should consider authorizing grant or other assistance funds for this purpose, rather than promote the use of noncompetitive contracts when competition is feasible. In short, when the Government supports basic research, use of assistance agreements is usually more appropriate than contracts.

APPLICATION TO CONTRACTS OVER $25,000

Senator **Jackson**. Mr. Gilroy, Dr. Jacques Gansler has written to Senator Cohen suggesting several modifications to the Bill. One Gansler recommendation is to:

"Change the minimum level for which this bill is applicable from $25,000 to something far higher. This level is only 2 man-months of work, and the paperwork required to run the competition *far* exceeds the potential savings, and is likely to exceed the cost of the contract itself." (emphasis in original)

Do you agree with Dr. Gansler's assertion and recommendation?

If so, at what level would you set the dollar level?

If not, please explain in detail why you disagree.

Mr. **Gilroy**. We do not agree. The Congress established the $10,000 ceiling for small purchases in 1974. We concur with the bill's provision to raise the ceiling from $10,000 to $25,000 Government-wide. (The Congress, in December 1981, has already raised the ceiling to $25,000 for DOD.) We believe that increasing the ceiling to $25,000 adequately accounts for the effects of inflation during this period.

Senator **Jackson**. Mr. Gilroy, Dr. Gansler also has suggested that generally the relevant agency should "perform a cost benefit analysis of the total costs (government and industry) for competition; the results of this analysis would form the basis (and rationale) for deciding whether to compete."

Do you agree with this suggestion?

If not, please explain in detail why you disagree.

Mr. **Gilroy**. We do not believe cost/benefit analyses would be appropriate, except in the case of dual (or multiple) sourcing decisions. That is, in our view it would not be appropriate to decide whether to compete most awards based on a cost/benefit analysis because (1) such studies if properly done would be administratively very burdensome and (2) it is too difficult to predict the dollar savings and other significant benefits that may result from competition on each contract award. The Comptroller General has held that:

"Whatever the contracting officer's conclusion as to potential price competition, however, it may not be the grounds for sole-source award of a contract. * * * The contracting officer may not speculate as to potential bidder's willingness to compete in the face of a particular firm's apparent competitive advantage. That willingness may only be tested in the crucible of competition. * * * Even where the contracting officer perceives little or no willingness in the market to supply competitive offers or bids, the administrative costs of preparing and issuing a solicitation are outweighed by the potential costs of losing bidders' confidence in the competitive system." (B–187369, 77–1 CPD 146, dated February 28, 1977.)

On the other hand, we believe that dual sourcing is potentially so expensive to the Government that such decisions constitute a special case for which cost/benefit analyses are appropriate. We agree with S. 338's provision for dual sourcing for purposes of competition if the agency determines that it would likely result in reduced overall costs. We believe that this determination should be based on a cost/benefit analysis.

DISCUSSIONS WITH OFFERORS SUBSEQUENT TO THE SUBMISSION OF PROPOSALS

Senator JACKSON. Mr. Gilroy, the bill permits discussions with offerors at any time after receipt of competitive proposals and prior to the award of the contract. The National Security Industrial Association has expressed the concern that "unless Congress restricts the extent of post-submission discussion, agencies are able to engage in auctioneering or the practice of requiring the submission of multiple 'best-and-final' offers."

Do you agree with this concern? If so, please explain why.

If not, please explain why not.

How, if at all, does S. 338 change current law on post-submission discussions?

Mr. GILROY. The current law does not limit discussions to the pre-best-and-final-offer period. Our legal decisions and the current regulations prohibit agencies from conducting an auction through the reopening of discussions (after the submission of best and final offers) and requiring the submission of new best and final offers for the purpose of getting a lower price. It seems that S. 338 would merely allow agencies to conduct post-best-and-final-offer clarification discussions and to reopen substantive discussions. Under the current system we have held that clarification and the reopening of substantive discussions if in the Government's best interest is okay. We believe these principles will still apply and that S. 338 just codifies what is now happening.

H.R. 2545—THE DEFENSE PROCUREMENT REFORM ACT OF 1983

Senator JACKSON. Mr. Gilroy, Congressmen Price and Dickinson have introduced H.R. 2545—a bill which also completely revises Sections 2304 and 2305 of Title 10. That bill addresses some of the same issues dealt with in S. 338, but in a different fashion.

Are there provisions of that bill that you favor as opposed to S. 338?

If so, what are they and why do you favor them as opposed to the comparable provisions of S. 338?

Mr. GILROY. We have not been asked to provide formal comments on H.R. 2545. However, from reading the bill I do not see any major provisions, addressing the same issues dealt with in S. 338, that we would prefer to S. 338. However, for a number of provisions in H.R. 2545, our testimony and our March 11, 1983, comments on S. 338 have provided our own specific suggestions for revisions to S. 338.

ATTITUDES OF KEY AGENCY PERSONNEL

Senator JACKSON. Mr. Gilroy, in your statement you refer to "a lack of commitment to competition on the part of key agency personel" as "a major problem." You cite this as a reason why Federal agency officials have failed to obtain competition on awards that could have been competitive.

What evidence did you find of this attitude?

To what factors do you attribute this attitude?

Mr. GILROY. We found numerous examples of the lack of commitment to competition on the part of key agency personnel. For example, in our review of a random sample of 109 DOD noncompetitive contracts, we concluded that 25 (or 23 percent) should have been competed (GAO/PLRD–81–45, dated July 29, 1981). Most of these 25 contracts demonstrate agency officials' lack of commitment to competition.

Contracting officers are responsible for ensuring competition when buying goods and services. However, we found instances where headquarters commands, technical personnel, and end users of these goods and services specifically directed or influenced contracting officers to buy certain items noncompetitively.

Requests from headquarters commands or high-ranking DOD officials for the purchase of specific goods or services accounted for 4 of the 25 inappropriate noncompetitive procurements in our review. These requests represent a direct type of pressure since the requestors are in a higher position within the organization than the contracting officers. This boss-employee relationship naturally inhibits or prevents contracting officers from strongly objecting to inappropriately directed noncompetitive procurements.

Although the Defense Acquisition Regulation does not prohibit technicians, scientists, and other specialists from assisting contracting officers by recommending certain products or companies, contracting officers ultimately are responsible for ensuring that competitive procurements are maximized. Despite this, 10 of the 25 contracts which should have been competitive resulted from contracting officers relying totally on inappropriate noncompetitive procurement recommendations from technical personel.

We were told that contracting officers did not believe they were qualified to question noncompetitive procurement recommendations. They assume, for example, that technical personnel were more aware of markets corresponding to their specialties. Further, the contracting officers believed that they lacked the technical background to question recommended noncompetitive procurements. Neither of these reasons, however, justifies the contracting officers accepting noncompetitive procurement recommendations without doing market analyses or without using proper competitive procurement processes.

Requests from end users for the purchase of specific goods or services accounted for 4 of 25 inappropriate noncompetitive procurements in our sample.

The problems associated with end-user judgments are similar to those for technical specialists; that is, contracting officers are accepting unsubstantiated judgments and comments about the qualifications of particular contractors and the availability of competition. Contracting officers believe that the end users are in a better position to know the market and contractor capabilities. However, this perception may be inaccurate. More important, contracting officers are abrogating their responsibilities by relying totally on end-user judgments when there is no factual support.

In addition, contracting officers did not always follow proper contracting procedures when establishing a procurement's minimum requirements or handling unsolicited proposals.

RESULTS OF NOTICE PROCEDURES

Senator JACKSON. Mr. Gilroy, in what percentage of sole-source contracts would you expect that notices issued inviting bids would produce responsive and responsible alternative sources of supply?

In the event this occurs on a relatively rare basis—such that the cost of the notice requirement in terms of time and money—exceeds the benefits—in terms of savings from competition—would you recommend that the provisions be rescinded?

If not, why not?

Mr. GILROY. It is impossible to predict the percentage of sole-source contracts for which a notice inviting competitive offers would produce responsive and responsible alternative sources. However, based on our review of random samples of such contracts, we were able to identify alternative sources that appeared to be capable and interested for one-quarter of DOD's and one-third of the major civil agencies' sole-source contracts. We believe that in a large majority of these cases a proper notice, which was not unnecessarily restrictive of competition, would have resulted in competition. It is also likely that in some other cases where our limited market search did not identify other sources, such a notice would have achieved this objective. If a substantial number of such contracts are not competed when the notice provision is used, we believe it would be prudent to examine the procedures followed, incuding whether the notices and the specifications used were, in fact, not unnecessarily restrictive as required by S. 338, before rescinding the notice provision.

RAISING SMALL-PURCHASE CEILING

Senator JACKSON. Mr. Gilroy, on page 5 of your statement, you indicate that you "support passing the [small purchase] ceiling to $25,000 governmentwide as long as reasonable competition is achieved."

What do you mean by reasonable competition in the context of that statement?

Mr. Gilroy. Our intent in using the term "reasonable competition" in connection with small purchases is to continue policies described in the current Defense Acquisition Regulation and Federal Procurement Regulations. Essentially, it means, for procurements over $500, obtaining a reasonable number of quotations from qualified sources (generally three) to assure that procurement is fair and reasonable to the Government, price and other factors considered. Small purchases not in excess of $500 are permitted without obtaining competitive quotations if prices quoted are considered reasonable. (See DAR 3-604.2.)

UNSOLICITED PROPOSALS

Senator Jackson. Mr. Gilroy, according to page 6 of your statement, GAO opposes "any effort to add a specific exception to competitive procedures for unsolicited proposals." Please explain in detail why.

You say on the same page that "based on our review of contracts resulting from unsolicited proposals, we believe that agencies can with relatively few exceptions undertake . . . market search for competitive sources to meet the Government's minimum requirements without disclosing such data."

Specifically what did you find in your reviews that led you to reach this conclusion?

Under your proposal, who would determine that using notice and market research might disclose the unsolicited proposer's "original thoughts, innovative approach, solution or other proprietary information?"

How would that be measured or gauged?

Mr. Gilroy. We do not believe that a specific exception to the requirement to use competitive procedures should be added for unsolicited proposals. Since it is often difficult to obtain information on the nature of the contacts which occur between agency and contractor officials and whether proposals are informally (improperly) solicited before unsolicited proposals are submitted, such an exception would provide an easy way to avoid use of the competitive process.

S. 338 would already permit the use of noncompetitive procedures when competition is not feasible on unsolicited proposals. That is, title I, section 303 (e)(1) and title II, section 2304(e)(1) permit agencies to use noncompetitive procedures when "the property and services needed by the Government are available from only one source and no other type of property or services will satisfy the needs of the executive agency."

Under the present procurement statutes, unsolicited proposals are not exempted from competitive requirements when competition is feasible. For example, the Defense Acquisition Regulation (DAR 4-910) states that:

A favorable comprehensive evaluation of an unsolicited proposal is not in itself, sufficient justification for negotiating on a noncompetitive basis with the offeror.

When a document qualifies as an unsolicited proposal but the substance (1) is available to the Government without restriction from another source, or (2) closely resembles that of a pending competitive solicitation, or (3) is otherwise not sufficiently unique to justify acceptance, the unsolicited proposal shall not be acceptable.

When procurement is intended and competition is feasible, the proposal shall be returned to the offeror together with the reasons for the return.

NASA's procurement regulations and the Federal Procurement Regulations, which cover procurement by the civilian agencies, contain similar provisions.

GAO reviews over the past few years of contracts above the small purchase threshold awarded by the Department of Defense and major Federal civil agencies showed that numerous noncompetitive contracts based on unsolicited proposals should have been awarded competitively. For example, our review of a statistical sample of civil agencies' sole-source contracts for all types of goods and services showed that for an estimated 507 (or 66 percent) of the 767 contract awards in our universe resulting from unsolicited proposals, the contractors did not possess unique capabilities for meeting the Government's minimum requirements and competition was feasible (GAO/PLRD-82-40).

Regarding DOD contracts, we found that the Defense Nuclear Agency (DNA) awarded 781 of its 795 new contracts noncompetitively in fiscal year 1979. The vast majority of these not only were based on unsolicited proposals, but also involved contractors starting work before the contracts were signed, thus making it difficult for contracting officials to solicit additional contractors. DNA's handling of these contracts violated the intent of DOD's guidance on the use of competition (GAO/PLRD-81-45 .

In addition, in our review f DOD's management support service contracts, we found that 40 percent of the 256 randomly selected contracts reviewed were based on unsolicited proposals. We stated that, although unsolicited proposals should not be discouraged, all to often they have been used to (1) subvert the competitive process, (2) encourage work that may not be important relative to DOD's mission needs and priorities, (3) abrogate DOD's responsibilities over the scope and direction of work related to defense management, and (4) perform work that is not truly unique or innovative (GAO/MASAD-81-19).

When a valid requirement exists and competition is feasible, the Government's minimum requirements, along with its evaluation criteria, should be incorporated into a solicitation document, such as a request for proposal, in such a way that:

Any proprietary information or unique ideas contained in an unsolicited proposal are not disclosed; and

Other potential offerors have an opportunity to compete on an equal basis.

Instead of exempting unsolicited proposals from competitive procedures, we suggest a different revision to S. 338 as a compromise on this issue. That is, we suggest that title I, section 313(c) and title II, section 2305(c)(3) be revised to exempt agencies from (1) conducting market research and (2) furnishing for publication in the Commerce Business Daily a preaward notice, if these procedures cannot be performed without disclosing the unsolicited proposer's original thoughts, innovative approach, solution, or other proprietary information. This provision should properly restrict the Government's market search for competitive sources to those situations in which it is appropriate. However, based on our reviews of contracts resulting from unsolicited proposals, we believe that agencies can with relatively few exceptions undertake such a market search for competitive sources to meet the Government's minimum requirements without disclosing such data.

Our reviews showed that most unsolicited proposals did not contain proprietary information that was essential to meet the Government's minimum requirements. Our most recent statistical sample results indicate that less than an estimated 10 percent of the unsolicited proposals we reviewed were so unique or innovative or the use of any proprietary information was essential so that a market search should not have been conducted.

We believe that under our proposal the contracting officer should be required to determine and justify in writing any case where use of a notice or market research, for competitive sources that could meet the Government's minimum requirements, would disclose the unsolicited proposer's original thoughts, innovative approach, solution, or other proprietary information. S. 338 already requires a higher-level review for any such award over $100,000.

FOLLOW-ON CONTRACT PROPOSAL

Senator **Jackson**. Mr. Gilroy, on page 6 of your statement you suggest an additional basis for use of noncompetitive procedures—for "awarding follow-on contracts that must be directed to a specific source because competition is not feasible."

You go on to discuss that this provision might be used where the Government can demonstrate it would avoid "duplication of costs to the Government for the property or service being procured."

What impact might this provision have on the impetus of the Department to dual- or second-source certain procurements?

Mr. **Gilroy**. It should not have any impact on dual sourcing decisions. We have suggested that before follow-ons may be awarded noncompetitively agency officials be required to demonstrate that a noncompetitive award is necessary to avoid (1) unacceptable delays in accomplishing the agency's mission objectives or (2) duplication of costs to the Government for the property or service being procured (that is, a substantial investment of some kind would have to be duplicated at Government expense by another source entering the field and because of the magnitude of these costs, recovering them through competition, would be highly unlikely). However, the fact that the Government would incur some cost and/or delay by changing contractors is not, in and of itself, a sufficient reason for noncompetitive procurement.

We agree with S. 338's provision which would permit dual sourcing for purposes of competition if the agency determines that to do so would likely result in reduced overall costs. We believe these provisions are consistent. If there is any question about this point, then we suggest that the Committee's report on the bill stipulate that the existence of the follow-on exception should not be inappropriately used to avoid dual sourcing in situations where the agency has demonstrated that dual sourcing would likely result in reduced costs to the Government.

CLASSIFICATION OF CONTRACT AWARDS

Senator **Jackson**. Mr. Gilroy, currently how does DOD classify contract awards that result when there is only one responsible and responsive bid or proposal to a multiple solicitation?

Are they considered competitive or noncompetitive?

Mr. **Gilroy**. DOD considers formally advertised awards to be competitive regardless of the number of bids actually received. Regarding the use of negotiation, DAR 21-126 provides:

"(d)(1) A contract shall be reported as "price competition" if offers were solicited and received from at least two responsible offerors capable of satisfying the Government's requirements wholly or partially, and the award or awards were made to the offeror or offerors submitting the lowest evaluated prices. However, a contract may also be reported as "price competition" even though only one offer is received when offers are solicited from at least two responsible offerors who normally contend for contracts for the same or similar items.

(2) Procurements shall not be reported as "price competition" where only one responsive offer was received and the solicitation was restricted to a prime contractor and his vendor for that item.

(3) Multiple awards in such areas as subsistence, clothing and equipage, and other commodities where several awards normally result from one solicitation may be reported, as "price competition," even though the total quantity of the solicitation is not awarded, if in the judgment of the contracting officer there are sufficient facts to support a valid finding of "price competition."

(4) Transactions shall not be reported as "price competition" solely on the basis of the number of solicitations made. Contracting officers shall consider the content of the responses to solicitations, the procurement history of the items procured, and other relevant information, and shall exercise sound judgment in the reporting of transactions as "price competition."

(e) Design or technical competition is present when two or more qualified sources of supply are invited to submit design or technical proposals, with the subsequent contract award based primarily on this factor, rather than on a price basis. Many research and development contracts, and many initial contracts for new military weapons fall into the category of design or technical competition. If some measure of price competition is present but the contract cannot be reported as a "price competition" award consistently with (d) above, the contract should be reported as a 'design, technical, or other competition' award."

SPECIFIC ACTIONS SHOULD HAVE BEEN TAKEN

Senator **Jackson**. Mr. Gilroy, on page 3 of your statement, you indicate that your reviews found that "specific actions should have been taken to ensure that competition was obtained when available."

What were those "specific actions"?

Mr. **Gilroy**. The specific actions included (1) performing market searches for competitive sources, including the publishing of notices inviting competition, before approving noncompetitive awards based on the justification that only one source could meet the Government's need, (2) properly justifying and documenting noncompetitive decisions and performing a proper review of the decision at a level higher than the contracting officer, as required by procurement regulations, (3) including only the Government's minimum requirements in contract specifications, (4) properly handling unsolicited proposals. This fourth point includes performing a market search, when this can be done without disclosing the unsolicited proposer's solution, unique ideas or other proprietary information. It also includes incorporating the Government's minimum requirements and evaluation criteria into a formal solicitation, when a valid requirement exists and competition is feasible, in such a way that any proprietary information or unique ideas in an unsolicited proposal are not disclosed and other potential offerors have an opportunity to compete equally.

PREFERENCE FOR SEALED BIDDING

Senator JACKSON. Mr. Gilroy, does GAO favor doing away with any preference for use of sealed bids in competing contracts?

If so, why?

Mr. GILROY. We favor the language of S. 338 which would remove the present strong statutory preference for sealed bidding and in its place (1) substitute statutory provisions that focus on competition, whether achieved through sealed bids or competitive proposals, and yet (2) provide some guidance on the conditions under which the use of sealed bidding is appropriate. This language should adequately ensure that sealed bidding is used when appropriate.

IMPACT ON FEDERAL CONTRACT RESEARCH CENTERS

Senator JACKSON. What will be the impact of S. 338, as currently worded, on the Defense Department (DOD) contractual relationships with Federal contract research centers such as Lincoln Laboratories at MIT? Will such contracts have to be competed periodically or does S. 338 provide a basis for use of noncompetitive procedures with respect to those contracts?

Ms. GILLEECE. DOD contracts with its Federal Contract Research Centers (FCRC) such as Lincoln Laboratories following normal procurement procedures. As S. 338 is now drafted, such contracts would be completed unless the task or area of research could only be provided by a particular FCRC under the first exception ". . . available from only one source and no other type of property or service's will satisfy the needs of the agency." Of course, as now written this would be subject to the publicizing provisions of S. 338 and other offers would have to be considered before award could be made to an FCRC.

EDUCATIONAL INSTITUTIONS CONCERNS

Senator JACKSON. A number of educational institutions have communicated with the Committee concerning the impact of the competition requirements of S. 338 on DOD contractual relations with such institutions; there is special concern about the Bill's requirements with respect to competing unsolicited proposals, that this might chill incentive to come forward with such proposals. Do you agree with these concerns? If so, please explain in detail, why. If not, please explain in detail why not.

If you agree with these concerns, what in your view, is the most effective method of addressing them?

Does DOD believe that educational and similar nonprofit institutions should be insulated from competition when bidding on research projects. If so, please explain why in detail.

Ms. GILLEECE. The Department of Defense obtains a number of innovative research and development ideas and concepts from industry through voluntary (not formally solicited) proposals. Where such proposals are worthy of further development, the development is contracted for on a noncompetitive basis—a vital incentive for the submission of such proposals. S. 338 would eliminate this incentive by requiring competition for development of ideas contained in unsolicited proposals. We believe that S. 338 should be amended to authorize acceptance of truly unsolicited proposals that demonstrate a unique or innovative concept without competition.

However, we recognize and share the concerns of Congress regarding the so called solicited unsolicited proposal and have suggested language that would narrowly define an unsolicited proposal so that the exception to competition for unsolicited proposals would not be available for solicited unsolicited proposals.

As to whether educational and similar non-profit institutions should be insulated from competition, we note that under the current provisions of the Armed Services Procurement Act there is no exemption from the requirements of competition for negotiated procurements with such institutions. S. 338 appears to retain the current statutory structure. Therefore, we believe that S. 338 would retain the status quo.

DOD INTERPRETATION OF PRESENT BILL LANGUAGE

Senator JACKSON. There are several provisions in the bill which contain rather broad language or at least language susceptible of more than one interpretation. Since the Department has now examined the bill. I would like its views as to the meaning of these provisions and how DOD would implement them if approved in their present form. One exemption from the requirement for use of competitive procedures permits use of noncompetitive procedures when "the property and services needed by the Government are available from only one source and no other type of property or services will satisfy the needs of the agency." Based on the bill and report, when is a property/service "available from only one source?"

Ms. GILLEECE. The term ". . . available from only one source and no other type of property or services will satisfy the needs of the agency" could cause delays in acquiring necessary equipment or services and negatively affect the defense effort of the nation. The first part of the phrase, ". . . available from only one source" would be implemented much as it is today. DOD policy and regulations require proper review and documentation to assure there is only one source for a product or service. The second part of that phrase ". . . no other type of property or services will satisfy the needs of the agency" could impede the defense effort. Needs of DOD are mission oriented. The Departments' requirements for major systems are considered by Congress through the authorization and appropriations process. Major commanders for each DOD component identify needs for meeting mission requirements. These requirements are screened through the planning, programming, and budgeting system, reviewed by the Defense Resources Board and made part of the five year Defense plan. Through this dynamic system of determining needs to meet mission requirements, requirements for most acceptable method of meeting the requirement is developed. This whole process could be negated and made subject to court decisions on what the "needs" of DOD are if S. 338 becomes law as now written. For example, if DOD determines after months and sometimes years of review that more F–16's are required to meet a mission need, a contractor for an alternate system could take DOD to court to have a judge decide if a helicopter couldn't also satisfy this need. At the very least, this would delay the acquisition and could degrade mission capabilities. The danger with this is that people without the responsibility for accomplishing military missions could determne what equipment or services will be acquired to satisfy the mission. Therefore, DOD recommends deletion of the words "and no other type of property or services will satisfy the needs of the agency."

Senator JACKSON. In several places, the bill indicates that bids or proposals shall be or have been "considered" by the head of an agency. Based on the bill and report in DOD's view what will the head of an agency have to do to comply with this "consider" requirement?

Ms. GILLEECE. The term "consider" is ambiguous. As a minimum, any response would have to be read and evaluated as to its impact on the instant procurement and any future procurement. It may mean that we would stop the instant procurement, develop evaluation criteria and continue after some delay with a competitive solicitation. Some judgment of the potential for the respondent to actually submit an offer would need to be made. As with all judgments made by contracting officers, they could be challenged to higher authority or perhaps the GAO and the courts. Eventually, this could become an area where well defined procedures are developed. A great deal of disruption would probably occur in the interim with probable impacts on mission requirements.

Senator JACKSON. The notice provisions require that where a notice is required the head of an agency may not "issue" a solicitation earlier than 15 days after the date on which such notice is published. Based on the bill and report, does DOD interpret this provision to prohibit distribution of any bid or proposal packages to potential bidders/proposers during the 15-day period?

Ms. GILLEECE. We are concerned that the language of S. 338 concerning notice of pending procurements will require a 15 day period during which the Department of Defense would be prohibited from distributing bid or proposal packages to potential bidders or proposers. Apparently, all that we could do during this period is assemble a bidders list.

REJECTION OF ALL SEALED BIDS OR COMPETITIVE PROPOSALS

Senator JACKSON. The bill permits "all sealed bids or competitive proposals received in response to a solicitation (to) be rejected if the head of an agency determines that such action is in the public interest." Otherwise, the bill states that the head of an agency "shall . . . award a contract with reasonable promptness to the responsible" bidder or offer that is most advantageous to the United States considering the price and other factors included in the solicitation. In the case of sealed bids the bid also must conform to the solicitation. How, if at all, do these provisions change current law, including that reflected in judicial or administrative decisions? More specifically, are there other reasons for which an agency head (or a contracting officer) currently can reject all bids (e.g., the government no longer needs the property or services) that will now be precluded by the bill language? If so, what are they and should they be precluded?

Ms. GILLEECE. The Government should never be forced to buy what it doesn't require. The termination for convenience clause in DOD contracts recognizes that fact. Prior to award of a contract, the Government's normally just as free to not consummate a contract as it is to enter into a contract. Out of fairness and consideration of the time and money invested by industry to prepare bids and proposals, it is DOD policy not to issue solicitations unless there is a firm requirement. Nevertheless, market planning documents may be released as long as industry is advised that no contract will result from that particular solicitation. In extraordinary cases, cancellation of the requirement would cause rejection of all the bids. We know of no change in S. 338 or interpretation of present law that would affect this.

FOLLOW-ON CONTRACTS

Senator JACKSON. Is it DOD's position that a follow-on contract is per se (i.e. by definition) not susceptible to the use of competitive procedures in any case. If so, please explain in detail your reasoning behind this position.

Ms. GILLEECE. No. However, for major weapon systems and equipment where the source selection was made competitively during the development, there is little realistic opportunity for any other source to compete for the annual production requirement. This is what falls in the follow-on category. We are using such techniques as second sourcing and leader-follower to develop capability in a competitive source. Generally these techniques lend themselves to a level below major weapon systems and equipment. Often quantities simply do not justify the up front cost needed to bring an alternate source capability up to the point of effective competition with the principal source. Thus, noncompetitive procedures must be used and we have provided for that as discussed in my statement.

DISCUSSIONS WITH OFFERORS SUBSEQUENT TO THE SUBMISSION OF PROPOSALS

Senator JACKSON. The bill permits discussions with offerors at any time after receipt of competitive proposals and prior to the award of the contract. The National Security Industrial Association has expressed the concern that "(u)nless Congress restricts the extent of post-submission discussion, agencies are able to engage in auctioneering or the practice of requiring the submission of multiple 'best-and-final' offers." Do you agree with this concern? If so, please explain why. If not, please explain why not. How if at all, does S. 338 change current law on post-submission discussions?

Ms. GILLEECE. We believe the concern is highly exaggerated. In our view there may be a necessity for a number of negotiation sessions before award to assure that the best over all contract is made. We definitely oppose a series of best-and-first offers to drive the price below a reasonable and fair level. However, there is a usefulness to this technique where as a result of discussions the offerors have a more precise understanding of the requirements and thus a best and final offer is the appropriate procedure.

Current law provides that discussions will be held with offerors whose proposals are within a competitive range, except in set-asides or to procurements where it can be demonstrated that acceptance of the original proposal without discussion would result in a fair and reasonable price. Section 2305 of S. 338 retains the basic requirement for discussions unless this solicitation indicates the award will be made without discussion. As my statement indicates, we support the thrust of this requirement, but would reformat Section 2305 to include the current language where it was most appropriate.

USE OF SPECIFICATIONS

Senator JACKSON. The bill would require that "each solicitation . . . include specifications." Is every solicitation issued under current law and regulations required to include specifications. (Note: 10 U.S.C. 32305 does not require specifications). If not, why should specifications be required in every case now?

Ms. Gilleece. The reference to specifications in the current Armed Services Procurement Act is sparse. It is used in Section 2305 with reference to invitation for bids in formal advertising. In our view there is no particular need for reference to specifications. Every contract must provide some form of the statement of work. In some cases that is a sufficient specification. Generally, specifications provide information such as drawings to enable prospective contractors to determine the kinds of material needed, the measurements, etc. in manufacturing the item. We have revised and reformated Section 2305 in S. 338 but retained the requirement concerning specifications in solicitations. The term specifications must be broadly defined in order to avoid any interpretation that each solicitation must have a detailed specification developed by the Government. Should that be the case, many businesses who have an acceptable commercially developed product would not be able to provide it. This would reduce competition.

FOLLOW-ON CONTRACTS

Senator Jackson. In light of the discussion on page 21 on the Governmental Affairs Committee Report (S. Reg. No. 50, 98th Cong., 1st Sess.) concerning follow-on contracts, why do you believe additional Bill language is necessary?

Ms. Gilleece. Unfortunately the language in S. 338 is not sufficient. In our opinion the words "and no other type of property or service will satisfy the agency needs" subjects follow-on to a test of whether alternate property could satisfy the needs. Thus, conceivably causing a re-evaluation of the program. This would be detrimental to the Department's mission. The report notes the inherent character of follow-on. We are picking up the report suggestions that where costly investment and startup cost are involved, noncompetitive follow-on is appropriate. Our recommended additional noncompetition exception simply recognizes this reality.

DUAL SOURCING

Senator Jackson. New section 2204(b) contained in S. 338 would give the head of an agency specific authority to award a contract under this title "to establish or maintain any alternative source . . . of supply of such property or services" if certain determinations are made. Your statement (p. 4) requests additional authority for use of noncompetitive procedures to "provide us with clear authority to preclude an incumbent contract and . . . to establish an alternative source." Why is section 2304(b) as drafted inadequate, especially when considered in the context of the language on p. 19 of S. Rep. No. 97–50 which recognizes that dual sourcing envisions "excluding the incumbent contractor."

Ms. Gilleece. Although we agree with the thrust of new section 2204(b), we suggest that it be redrafted for two reasons: (1) to preserve to the maximum extent existing long-term GAO and judicial precedent by maintaining existing statutory language, and (2) to provide a clear statutory statement allowing the preclusion of an incumbent source.

PETROLEUM SMALL PURCHASES

Senator Jackson. What aspects of the "unique price structure of the petroleum industry" warrant a $100,000 small purchase threshold for petroleum products?

Ms. Gilleece. The uniqueness that we are alluding to is the upward price spiral of petroleum over the years following the oil embargo a decade back. Oil has increased by a factor of 4 to 5 times in the intervening years. What was a small purchase then is no longer a small purchase for the exact same quantity. Oil is purchased at market prices with the saving in price dependent on supply versus demands. When supply is available we, as well as commercial customers of the oil industry can purchase competitively. It would ease the administrative process and time in requiring small quantities of oil to meet local requirements if small purchase procedures to $100,000 could be used instead of the procedures involved in formal requests for proposal. Competition would not be effected as competition is required when using small purchase procedures. In our view, it would most likely result in more awards to local small business distributors of oil products.

CHANGE IN REQUIREMENTS

Senator Jackson. On p. 21 of the Governmental Affairs Committee Report there is a discussion of the available only from one source exception to competitive procedures. The Report states: "If competitive alternatives can be made available by modifying the requirement or redescribing it in terms of the function or performance required without impairing the agency's mission responsibility, a noncompetitive procurement would not be permissible." Please explain what is ill-advised or unwise about that requirement.

Ms. Gilleece. First, the words quoted are not in the language of S. 338 itself. However, it is our view that such words even in the report imply that attempts must be made to modify or redescribe the requirement, e.g., tracked vehicle versus wheeled vehicle in terms of function, e.g., must climb a two-foot barrier versus it must traverse uneven ground, without impairing the agency's mission responsibility, e.g., move troops to forward positions. This process could result in long and debatable arguments within and without the Department. In our view we would be required to prove in each and every noncompetitive action that this could or could not be done. We believe such a requirement would add months perhaps years to the acquisition and fielding of weapon systems and equipment. We consider alternatives in the upfront process of assessing how a potential enemy threat is to be countered. This requirement would extend this consideration for years through development and early production. We believe it could warp the national security mission responsibility in time.

UNUSUAL AND COMPELLING URGENCY

Senator Jackson. According to the Governmental Affairs Committee Report (p. 21) the concepts of compelling and of unusual urgency were drawn from existing regulations. DAR 3–202.2. Do you still believe this concept is "new and undefined"?

Ms. Gilleece. Although DAR 3–202.2 does use the phrase, "compelling and of unusual urgency", the statute utilizes the concept of the public exigency. A considerable number of GAO cases stand as precedent for interpreting the phrase "public exigency". Some of these cases refer to the compelling and unusual urgency of the procurement and others do not.

We believe that the maximum precedent value of these cases should be retained and that accordingly, the current statutory language should be maintained if possible. Otherwise it will be argued that Congress changed the language because of its desire to move away from the concept of public exigency. In short, "public exigency" has become a term of art which we believe should not be changed.

AUTHORIZED BY LAW TO USE NONCOMPETITIVE PROCEDURES

Senator Jackson. Approximately how many distinct statutory provisions authorize or require that purchases be made through another agency or from a specified source?

Ms. Gilleece. Although there may be other statutes, the primary ones which relate to Department of Defense procurement are:

1. The Small Business Act (15 U.S.C. 637(a)) which authorizes in conjunction with SBA a procurement set-aside program for socially and economically disadvantaged small business concerns.
2. The Wagner-O'Day Act (41 U.S.C. 456 et seq.) which requires the procurement of certain supplies produced by the handicapped.
3. The Economy Act (31 U.S.C. 1535, 1536) which authorizes procurement by Federal agencies from or through other Federal agencies.
4. The purchase of prison-made products by Federal departments (18 U.S.C. 4124).

WALSH-HEALEY AND DAVIS-BACON ACTS

Senator Jackson. What was the purpose and rationale of present section 2304 (f) dealing with the Walsh-Healey and Davis-Bacon Act contracts? What would be the effect of not reinserting the substance of that provision in S. 338?

Ms. Gilleece. The language in these two acts was worded in such a manner as would cause them to be applicable only to contracts utilizing formal advertising. Procedures in Section 2304(f) make them applicable to negotiated contracts as well. Failure to reinsert this provision in S. 338 would restrict the application of the acts to contracts utilizing sealed bid procedures.

APPROVAL OF CERTAIN TYPES OF COST CONTRACTS

Senator Jackson. What was the basis for Congress original enactment of the present 10 U.S.C. Section 2306(c)? Why is that rationale no longer applicable today?

Ms. Gilleece. There was a concern that since such contracts provide no final price for which the contractor is obligated to deliver a product or service the use of such contracts could increase the cost to the Government. Thus, the inclusion of a provision requiring a determination that the use of such a contract is likely to be less costly. Over the years procedures for use and monitoring these contracts has increased. These contracts are audited during and after performance. Only cost allowable and allowable under Defense Acquisition Regulation Section XV are accepted. A disciplined system for determining profit and fee objectives is now required (weighted guidelines). Further, the Government selects the contract type, and utilizes these types of cost contracts where the actual cost of performance cannot be reasonably ascertained such as for research and development. If a fixed price type contract were used, the contingent cost factors that would have to be included could result in undeserved profit or excessive loss. Neither condition is in the best interests of the Government. Thus, the very nature of the contract type assures that it is used where it is less costly and most beneficial to the Government. The requirement for a determination by this provision simply increases paperwork with no corresponding benefit.

LIMITS ON CONTRACTOR FEES

Senator Jackson. What was the original purpose of imposing the statutory fee limitations in 10 U.S.C. Section 2306(d)? How has the weighted guidelines method replaced the purpose of these statutory restrictions?

Ms. Gilleece. There was a concern that unwarranted fee (profit) may be negotiated on a cost-plus-a-fixed-fee contract (CPFF). A CPFF contract is a low risk contract for the contractor in that the Government agrees to pay all costs that are allocable and allowable. At the time of enactment there was very limited guidance on what constituted allocable and allowable cost and there was no uniform guidance on how the fee should be developed and evaluated. Since then extensive direction has been provided in the Defense Acquisition Regulation (DAR) Section XV on allocable and allowable costs including the incorporation of Cost Accounting Standards. Further, a disciplined system of developing profit and fee objectives has been devised and incorporated in the DAR. These fee objectives now clearly recognize the minimal cost risk of performance on the part of the contractor. Such fee limitations are now an archaic holdover that have little place in today's business environment. Occasionally they mitigate against acceptance by the contractor of a final fee arrangement when it would otherwise be in the best interests of the Government.

PROCUREMENT RECORDS

Senator Jackson. How, if at all, do the records DOD maintains "consistent with the requirement of the Office of Federal Procurement Policy Act" differ from what is required by S. 338? Where are the overlaps and duplications?

Ms. Gilleece. Currently, we provide procurement data to the Federal Procurement Data Center consistent with the implementation of the requirements in the Office of Federal Procurement Policy Act. The Federal Procurement Data System Advisory Council chaired by the Office of Federal Procurement Policy determines what data should be collected in terms of cost, utility, and desired information. Section 2316 of S. 338 requires identification of the noncompetitive procurement procedures used. Currently we only identify that it was noncompetitive. What purpose is served by identifying which noncompetitive procedure is used. It further requires identification of a procurement with only one bid following a competitive procedure. Is such an action to be considered competitive or noncompetitive? It further requires the reason for the use of the noncompetitive procedures. The reason is the noncompetitive procedures itself set forth in subsection 2304(e). This implies that some other reason is to be provided. If there were 50,000 noncompetitive actions, is it anticipated that 50,000 pages of separate reasons be provided? In our view justifications may be intended but there is no reasonable way that we know of to collect 50,000 different justifications for statistical portrayal. What purpose is served in this? Additionally the section requires the position of officers or employees approving use of noncompetitive procedures. This information is not currently collected. For high value contracts there are numerous reviews and coordination at many levels including high level committees. Also organizational structures differ in the Military Departments and defense agencies. We can always identify the contracting officer who signed the contract for the Government. We believe identifying the position would result in a hodge podge of titles that would have little or no meaning. This would serve no useful purpose. Thus, we conclude that the record requirement would create excessive, unnecessary and costly paperwork burden.

ELIMINATION OF WRITTEN FINDINGS AND DETERMINATIONS

Senator **Jackson**. What was the basis for Congress originally establishing the determinations and findings in 10 U.S.C. 2310(b) that you now suggest eliminating? How has that rationale disappeared?

Ms. **Gilleece**. We only recommend two minor changes to the conforming amendments (page 36 of S. 338 subsection (b)). One is to eliminate the requirement for a written finding of the determination required by Subsection 2306(c) that use of a cost type contract will be less costly to the Government. We recommend deletion of this requirement as discussed in a prior question. Thus revision in the conforming amendment is necessary. The other change is to eliminate the requirement to send a copy of a finding to delete the Comptroller General audit clause in foreign contracts or foreign subcontracts. The finding and determination is still required and retention of the written finding by the agency for six years is still required. We find little useful purpose in a statutory requirement to send a copy to GAO. There is always a copy in the agency file available to GAO.

Questions Submitted by Senator Carl Levin

SAVINGS FROM COMPETITION

Senator **Levin**. Mr. Gilroy, what is GAO's estimate of the percentage that can be saved from using competitive procedures versus awarding a contract on a sole-source basis?

Mr. **Gilroy**. Traditionally, DOD has estimated that about 25 percent can be saved by competing procurements that would otherwise be awarded on a noncompetitive basis. Our reviews have not been sufficiently comprehensive to statistically project savings from competing noncompetitive procurements. In fact, it would be very difficult to make statistically valid projections covering the broad range of goods and services procured by the Government. Nevertheless, we are of the opinion that 25 percent is a conservative estimate of the average savings from price competition.

ABUSE OF REGULATORY REQUIREMENTS

Senator **Levin**. Mr. Gilroy, in your statement you comment about agencies ignoring existing requirements for pre-award notices of sole-source contracts. You indicate that "this is an area of serious abuse which results in potential competitors being effectively restricted from competing."

In examining these cases where notices were not properly given did GAO identify specific instances where capable competitors were precluded from competing by a lack of notice?

In how many instances?

What were the contract dollars involved?

If no specific instances were identified, what is GAO's estimate of the percentage of cases where notice is improperly withheld and a capable competitor is effectively restricted from competing?

Mr. **Gilroy**. Yes. We found that the lack of any market search for potential competitors, which includes the absence of a notice inviting competition in the Commerce Business Daily, was a major factor in both defense and civil agencies' failure to obtain competition on contract awards that could have been competitive. In fact, this was a problem on a large majority of the 79 randomly selected defense and civil agency sole-source contracts for which we concluded competition was feasible and may have been a factor in some other cases for which we were not able to identify alternative sources because we were not able to utilize the Commerce Business Daily for our own market search.

Although it is impossible to estimate precisely the dollar amounts that could have been awarded competitively, we believe that a substantial proportion of the noncompetitive dollars we identified as susceptible to competition could have been competed if proper notices inviting competition were published in the Commerce

Business Daily. That is, we believe a substantial proportion of the estimated $412 million in noncompetitive awards ($289 million for DOD and $123 million for the six civil agencies reviewed) could have been competed. The dollar amounts for both defense and civil agencies' contracts represent initial contract obligations, which in some cases may be substantially increased through later contract modifications.

COMPETITION IS IMPRACTICAL

Senator LEVIN. Mr. Gilroy, GAO advocates retaining the "competition is impractical" basis for noncompetitive contracts with certain restrictions to take care of the "few cases" where "unforeseen circumstances may make" noncompetitive procurement appropriate.

Is such a broad provision necessary to accommodate "a few cases"? Especially since you state that "we do not know of any situations for which noncompetitive procedures are appropriate" other than those in the bill and the other addition advocated by your testimony.

What might be "specific reasons for any use of this exception"?

How and to whom would they be disclosed and justified?

Isn't this the exception in present law which is extensively used as a basis for sole-source contracts?

Why are you confident that the restrictions you espouse will prevent abuse of this provision?

Mr. GILROY. There is clearly some risk of abuse in adopting a broad catch-all exception, such as "competition is impracticable." That is why our testimony states that we would support such an exception "only if" these three safeguards are also adopted:

A clear expectation is stated that such an exception would be used very infrequently.

The specific reasons for any use of this exception must be disclosed and justified.

The authority to use this exception could not be delegated to any official more than one level below the agency head. That is, only officials at or above the assistant secretary or equivalent level could authorize use of this exception.

With such safeguards every use of the exception would be subject to close scrutiny. Although the risk of abuse still would exist, we believe it would be reasonable considering the alternative risk of requiring competition in situations where it is not appropriate. Requiring inappropriate use of competition would be a waste of time and money and create unfavorable attitudes about competitive requirements that could undermine the worth while objectives of S. 338.

Regarding the specific reasons for use of this exception, our testimony noted the need to clarify the bill's coverage of follow-on contracts. If such coverage is not clarified, the additional exception might be used extensively to cover follow-on situations that are not covered by the first exception in the bill. Otherwise, as we noted in our testimony, the additional exception should be limited to those few cases, if there are any, where unforeseen circumstances make noncompetitive procurement appropriate and such circumstances are not authorized under S. 388's present exceptions. We believe that any valid circumstances that can be foreseen, and we know of no others, should be covered by one of the specific exceptions.

We suggest that a written justification demonstrating that the terms of the exception are met (that is, why noncompetiive procuremen is "necessary" or "competition is impracticable," etc.) be required to be approved by the agency head or an official one level below the agency head. This justification should be made available in the contract file. S. 388's "record requirements" would already require disclosure through the Federal Procurement Data System, the Governments' official procurement data base.

NOTICE AND MARKET SEARCH PROVISIONS

Senator LEVIN. The General Services Administration (GSA) recently promulgated a final rule including "Policies to Maximize Use of Competition and Minimize the Number of Noncompetitive Procurements (41 CFR Chapter 1, 46 Fed. Reg. 16261, April 15, 1983). This rule embodies market research and notice provisions with respect to noncompetitive proposals analogous to those contained in S. 338. Of course, the terms of this rule only apply to federal civilian agencies governed by the Federal Property and Administrative Services Act of 1949. In the past DOD has opposed such market search and notice provisions in connection with sole-source procurements. If you do so now, please explain in detail your rationale for why DOD should be singled out (along with NASA and the Coast Guard) and treated differently than the rest of the federal government.

Ms. GILLEECE. DOD does not oppose market search and notice provisions. It is DOD policy to increase competition by publicizing procurements which offer competitive opportunities for prospective prime contractors or subcontractors thus assisting small business and labor surplus area concerns and broadening industry participation in Defense procurement programs. (DAR 1-1001). More than 70 percent of all actions are synopsized covering about 85 percent of all new procurement dollars. DOD probably does more in this area, in both relative and absolute terms, than any other agency. DOD will continue to synopsize all procurement actions in accordance with law. The DOD regulations are designed to implement the law in a way that will appropriately consider the desires of all and the needs of the Armed Forces. We believe the present law and regulations provide the proper balance in a system providing for millions of actions and billions of dollars. The GSA rules (published in 41 CFR Chapter 1, 46 Fed. Reg. 16261, April 15, 1983) appear to comply with those of DOD. Instead of a divergence of policy, these regulations appear to bring the civil agencies more in line with what DOD has required for many years. This is apparently so since GAO has testified before Congress that the civilian agencies reviewed rarely publicized pre-award notices in the Commerce Business Daily. Only two percent of the civil agencies awards reviewed were synopsized when DOD has publicized more than 70 percent of its actions and about 85 percent of the dollars.

ADMINISTRATION AND DOD'S POSITION ON THE BILL

Senator LEVIN. The Governmental Affairs Committee report on S. 338 (p. 8) states that "S. 338 is supported by the administration" are you presenting testimony on behalf of the Administration or just the Department of Defense? If not the Administration, did you attempt to get your testimony cleared by OMB? What happened?

Ms. GILLEECE. The DOD statement was reviewed by OFPP and approved by OMB prior to the hearing. DOD has consistently endorsed the need to improve our basic procurement legislation and supports the thrust of S. 338, but believes certain changes are necessary in the bill.

ADMINISTRATION AND DOD'S POSITION ON THE BILL

Senator LEVIN. At a recent hearing before the Governmental Affairs Committee, Mr. Gordon, your assistant, testified that the Department's position on S. 338 was that "while it has some difficulties with some technical aspects of it, the thrust of the legislation is one in which we agree." If DOD's position has changed, please explain precisely how and why.

Ms. GILLEECE. The DOD position has not changed. DOD supports the thrust and concepts of S. 338, which are based at least in part on recommendations made by the Commission on Government Procurement more than a decade ago.

NO PREFERENCE FOR SEALED BIDS

Senator LEVIN. The opening portion of your statement urges us to "minimize" change in "present procurement concepts where they will make sense in today's environment" (p. 3). Yet you then propose discarding the preference for bidding procedures, the essence of which is embodied in present law and regulations—using sealed bids opened publicly at a stated time (p. 4, statement, at top). Why does this preference apparently no longer "make sense in today's environment"? Please explain in detail. Do you disagree that sealed bid procedures would still provide the greatest potential competitive benefits when procuring routine property and services for the Department of Defense? If not, why not? If so, what is to prevent—absent any required preference—a contracting officer from immediately deciding to negotiate contracts for those properties and services?

Ms. GILLEECE. Formal advertising (which utilizes sealed bids) and negotiation are merely procedures that the Government uses to acquire goods and services. Current statutes establish a preference for formal advertising allowing negotiation on an exception basis. This has created the false impression that formal advertising equates to competition and negotiation equates to sole source contracting.

In today's increasingly complex environment, the Department of Defense often finds itself at the leading edge of technology when it acquires supplies and services. In such instances, technical risk and approach are of paramount importance in assuring that maximum value is obtained for the taxpayer dollar. Therefore, when acquiring such supplies and services, the Department often utilizes the procedures of competitive negotiation to evaluate technical factors. However, these procedures are clearly competitive, often involving a number of contractors who vie for the award. We believe that the proper statutory preference should be for competition with sealed bids and competitive negotiations (competitive proposals) recognized as equally preferable competitive techniques. This would place the statutory emphasis where it is most appropriate and allow the contracting officer to use the contracting procedure most suitable for the requirement. Accordingly, we recommend that the preference in S. 338 be eliminated and replaced by criterion to serve as a guide in selecting which competitive procedure to utilize.

DUAL SOURCING

Senator LEVIN. New Section 2204(b) contained in S. 338 would give the head of an agency specific authority to award a contract under this title "to establish or maintain any alternative source . . . of supply of such property or services" if certain determinations are made. Your statement (p. 4) requests additional authority for use of noncompetitive procedures to "provide us with clear authority to preclude an incumbent contractor and . . . to establish an alternative source." Isn't what you are really seeking is specific authority to avoid having to compete the contract for the second source? Isn't it correct that S. 338 as currently drafted would not authorize the use of noncompetitive procedures in that context, unless one of the six criteria could be met?

Ms. GILLEECE. (a) The issue of developing alternate sources is addressed in two places in the changes to S. 338 proposed by DOD. In one situation, the DOD change would clearly authorize restricting the established source from competing with other firms vying to be selected as the alternate source. This would enable DOD to prevent the incumbent from thwarting the establishment of an alternate source. Another suggested change would permit award of a contract to a selected source in the interests of establishing or maintaining competition. This authority would enable DOD to benefit from competition in situations such as where two contractors have been in parallel development of a major system. Both companies and the Government have likely invested heavily in the prototypes and developed valuable expertise in the system. At the end of the prototype competition phase, one company would be selected as the winner of the competition. To retain the benefits of competition through the production phase, a second source could also be awarded a contract. This authority would make it possible to select the competing contractor to take advantage of the expertise and investment made during the competitive development phase.

(b) S. 338 as now written would not clearly permit us to take advantage of the superior expertise available with a competing contractor in situations similar to that described in the previous response.

DISCRETION OF AGENCY HEAD

Senator LEVIN. You also suggest that noncompetitive procedures be usable whenever "the head of the agency may determine it is necessary to award on other than a competitive basis" (p. 4, statement). Later you suggest that the agency head also would have to determine use of noncompetitive procedures is not inconsistent with the public interest. Please explain how such an exemption would contribute to a greater reliance on competitive versus noncompetitive procedures? What is the basis for your apparent belief that use of this provision would be limited to "unique situations currently unforeseen"? Please explain your reasons in detail.

Ms. GILLEECE. Although we concur with the concept of a statutory preference for competition with noncompetitive awards being authorized in only limited circumstances, we are concerned that we are simply not knowledgeable enough to know what circumstances may arise in the future (that we are currently not aware of and cannot predict) which would require use of noncompetitive procedures. Our exception (9) is intended for this narrow purpose, and to assure that it is not abused we are suggesting language that would require high level approval in order to utilize the authority.

NOTICE PROVISIONS

Senator **Levin**. Your statement opposes the notice requirements of S. 338 as "burdensome and counter-productive to efficient procurement practices". You believe that "publicizing and related matters are more suitable to regulation." First, existing regulations require a notice in the Commerce Business Daily in the case of almost all contracts over $10,000 at least "10 days before issuance of solicitations". DAR 1-1003.2. Bidders generally have 30 days to bid (20 days for the procurement of standard commercial articles or services). So in most cases S. 338 is adding 5 days to the existing time periods already supposedly provided by the existing regulatory process, isn't that correct? Second, the Governmental Affairs Committee Report (p. 13–14) discusses, as did Mr. Gilroy of GAO, the level of compliance with GAO pre-award notices were "rarely publicized" in the Commerce Business Daily. In one case, GAO found notices were published in only 2 percent of the awards reviewed. Giving DOD the benefit of a substantially better record of compliance it still means that the regulatory requirements have been ineffectual. Do you disagree? If so, why? If the regulations are ineffectual, why is legislation inappropriate?

Ms. **Gilleece**. (a) The legislation, as written, is inconsistent with the initiatives DOD and the Executive Branch have taken to streamline the contracting process and reduce leadtime. It disturbs many of the policies which have governed synopsis and pre-contract approvals for many years. Specifically, a 15-day "advance" synopsis and a 30-day "opening period" is required on all buys over $10,000. The impact on the DOD would be to insert a mandatory 45-day leadtime (as a minimum) for solicitations. This would generally be 15 to 20 days longer than is now customary. The consequence of this increase is difficult to quantify, but believe it would have a negative impact on mission support, and prevent our taking full advantage of the recent increase in the small purchase threshold to $25,000. There are an estimated 170,000 actions awarded by DOD between $10,000 and $25,000 in value. These actions can be awarded using small purchase procedures, which are intended to reduce workload on both the Government and industry by simplifying the paperwork and procedures involved. Better mission support can also be obtained through a shorter acquisition leadtime for these relatively low-value purchases. Under normal small purchase procedures, an award could theoretically be made within one day. Most such awards are made after competition. Such efficiency has been prevented so far on buys between $10,000 and $25,000 because of the requirement to synopsize all actions over $10,000. Current synopsis rules add a minimum of 15 to 20 days to small purchases over $10,000. An additional consideration of extending the leadtime for synopsized purchases is the impact on spares and repair parts for weapon systems. Current logistics policy is geared toward a contracting leadtime that is as short as possible; with a shorter reorder time, fewer parts have to be stocked and less money must be invested in inventory.

While it is difficult to quantify the impact in dollars and cents, we firmly believe that every day of additional leadtime means a significant increase in inventory investment and further degrades our ability to supply spare parts in a timely manner. This can have a negative effect on readiness and sustainability of deployed weapon systems. (1) Six of the current ten exemptions to the synopsis procedure would be eliminated. Requiring synopsis of perishable subsistence and utilities buys would cause DOD to synopsize approximately an additional 20,000 actions a year. Since both categories are purchased in local markets, national synopsis makes little sense. The ability to quickly obtain fresh produce and meats for local installations would be inhibited by the synopsis requirement. Elimination of the exemption for "orders under existing contracts" would needlessly delay the processing of such orders, since current policy requires that synopsis of the basic contract address the contemplated orders that would be issued later. Loss of this exemption alone may cause the DOD to synopsize 50,000 more actions per fiscal year. The total estimate of current exemptions which would be synopsized as a result of S. 338, ranges over 50,000 actions per fiscal year. One area of particular concern to us is the synopsis leadtime; i.e., the time between mailing of the synopsis request to CBD, and its publication. Currently, this average is 7 to 10 days. If delays occur due to CBD's misplacing a request or due to backlog at CBD, our affected solicitation will be delayed for an indefinite period of time. This will degrade the procurement mission (such backlogs now occur at year end); it will also effectively remove the timing of solicitation issuance from our contracting managers' control. We are also concerned that the bill did not make provision for additional resources for the Commerce Department to publish a greatly expanded CBD, which would result from reduction of the exemptions and reduction of the post-award synopsis threshold. This would increase the workload and publishing cost for CBD. If no provision is made for additional staffing and funding (paper, printing costs, etc.) at CBD, backlogs and delays in publishing notices will swell to an unacceptable level. Within DOD, a system must be developed to time solicitation issuance to coincide with synopsis publication. This will add to clerical workload. Solicitation dates will have to be adjusted for delays in synopsizing to comply with the proposed law. Despite the additional resources and greater leadtimes involved, no commensurate increase in the level of effective competition is expected.

(b) For fiscal year 1981 DOD synopsized about 70 percent (104,000) of new procurement actions over $10,000, which represents 83 percent of the dollars ($51 billion).

[The following information was submitted by Senator William S. Cohen:]

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

OFFICE OF FEDERAL
PROCUREMENT POLICY

MAR 25 1983

Honorable William V. Roth, Jr.
Chairman, Committee on
Governmental Affairs
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman:

This is in response to your request for our views and recommendations concerning S. 338, "The Competition in Contracting Act of 1983."

S. 338 would revise the procedures for soliciting and evaluating bids and proposals and for awarding Government contracts. The bill establishes a preference for the use of competitive procedures in contracting for goods and services and prescribes procedures for both competitive and non-competitive procurement. Use of non-competitive procedures is limited to six exceptions to competition. The bill also requires notices to be published before solicitation and award and establishes an advocate for competition in each executive agency.

We support S. 338, as revised by Senator Cohen's amendments as set forth in the Enclosure; its provisions parallel the competitive procedures contained in the Administration's "Proposal for a Uniform Federal Procurement System," submitted to Congress in February of 1982. Placing formal advertising and negotiated procurement on an equal basis is an important step in reforming the procurement process. The emphasis on increased competition and the restrictions placed on non-competitive procurement comport with the Administration's efforts under Reform '88. Our comments on S. 338 are enclosed. You should also know that other executive branch agencies may submit comments to the Committee on specific provisions of this legislation.

You also requested our assessment of the possible paperwork and regulatory burdens which might result from passage of S. 338. The bill would have only a slight initial regulatory or paperwork impact on Government contractors. Section 102 of the bill requires contractors to submit cost or pricing data in certain circumstances. Although the requirement is not contained now in the Federal Property and Administrative

Services Act, it is part of the Armed Services Procurement Act. Most Government contractors do business with both the civilian agencies and the Department of Defense and would not have to adjust their procedures and bookkeeping to comply with the requirement.

S. 338 would also have a minor impact on the paperwork and regulatory burdens of the agencies. Most of the publication and recordkeeping provisions are already required by the Defense Acquisition Regulation and the Federal Procurement Regulations. The changes in competitive and non-competitive procedures, the requirement to include special simplified procedures and forms for small purchases in agency procurement regulations, and the notice and publication of requirements would necessitate issuance of new agency regulations initially, but the increase in the regulatory burden would be minimal.

Sincerely,

Don Sowle

Donald E. Sowle
Administrator

Enclosure

Enclosure

S. 338, AS AMENDED BY SENATOR COHEN'S PROPOSAL

TITLE I

Sec. 303(b). Is the authority to establish alternative sources intended as an exception to the use of competitive procedures? If so, it should be placed in Sec. 303(e).

Sec. 303(e). A seventh exception should be added to allow use of non-competitive procedures when the Secretary determines that it is impracticable to obtain competition. The Administration included this exception in its proposal as a safety valve for those exceptional circumstances (not covered by the six exceptions) when competition would be impracticable.

Sec. 313(a)(3)(A). The requirement for a 15-day wait between publication of notice and issuance of a solicitation should be deleted. This would only add to procurement lead time and unduly delay the procurement process.

Sec. 313(c)(2)(A). Delete the reference to clause (3) of Sec. 303(e); the notice requirement should be applicable when award is made to a particular source or sources in order to maintain an essential industrial capability in the United States or to achieve national industrial mobilization.

TITLE II

The comments to Title I apply to similar provisions of Title II.

TITLE III

We agree with the concept of an Advocate for Competition; however, Executive Order No. 12352 of March 17, 1982, established the role of the Procurement Executive, which covers the Advocate for Competition's role. Therefore, we do not feel that there is a need for legislation in this area.

UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

MAY 18 1983

The Honorable William S. Cohen
United States Senate

Dear Senator Cohen:

Your office has requested that we write you a letter summarizing the General Accounting Office's position on Senate bill 338, "The Competition in Contracting Act of 1983," which you introduced during the 98th Congress.

We strongly support enactment of S.338. As you know, the Comptroller General took this position in his May 11, 1983, letter to the Chairman, Senate Committee on Governmental Affairs, which provided our Office's detailed comments on the bill. Previously, on June 29, 1982, I presented our Office's testimony before the Senate Committee on Governmental Affairs and also expressed support for S.2127, the earlier version of S.338 and in many ways substantially the same bill. On both these occasions we expressed the view that the bill could be an effective framework for improving Federal procurement.

GAO reviews over the past couple of years using statistical samples of new, noncompetitive contracts above the small purchase threshold awarded by the Department of Defense and six major Federal civil agencies showed that each of these agencies frequently awarded contracts on a sole-source basis unnecessarily. We believe, if agencies effectively implement the provisions of S.338, that (1) the number of unnecessary sole-source contracts will be reduced, and (2) this will result in significant benefits, such as cost savings, better solutions to the Government's problems relating to its needs for goods and services, and increased public confidence in Government.

S.338 proposes several important changes in the Federal procurement statutes. I would like to specifically mention three areas that we believe deserve broad support. First, the bill would remove the present strong statutory preference for sealed bidding and in its place substitute statutory provisions that will focus on competition, whether achieved through sealed bids or competitive proposals, and seek to limit noncompetitive procurements. We agree that it is competition, not just competition through sealed bidding, that should be emphasized. We also agree that noncompetitive procurements should be limited to very special and well-defined circumstances and GAO reports have recommended this type of requirement.

Second, the bill would strengthen procedures for publicizing prospective awards in the Commerce Business Daily consistent with one of our recommendations that we consider especially important. Our work has shown the agencies' failure to publicize notices of the type required under S.338 is an area of abuse which often results in potential competitors being effectively restricted from competing.

Third, the bill requires agencies to use advance procurement planning and market research to obtain competition. The absence of these procedures was identified in GAO reviews of defense and civil agencies' sole-source contracts as a cause of major deficiencies needing correction.

As described in detail in the Comptroller General's May 11, 1983, letter providing our formal comments on S.338, there are a few remaining areas in the bill where we believe technical improvements would be desirable. We would be glad to continue to work with you and your staff on these matters. However, for reasons such as those described above, we strongly support S.338.

Please let me know if we can be of any further assistance in this matter.

Sincerely yours,

Robert M Gilroy

Robert M. Gilroy
Senior Associate Director
National Security and International
Affairs Division

UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

NATIONAL SECURITY AND
INTERNATIONAL AFFAIRS DIVISION

JUN 3 1983

The Honorable William S. Cohen
United States Senate

Dear Senator Cohen:

In your May 23, 1983, letter regarding Senate bill 338, the Competition in Contracting Act, you asked for GAO's opinion on whether additional exceptions to the use of competitive procedures are desirable for (1) unsolicited proposals and/or (2) cases for which the agency head determines that it is impracticable to obtain competition (referred to as a catch-all exception).

Unsolicited proposals

We do not believe that a specific exception to the requirement to use competitive procedures should be added for unsolicited proposals. Since it is often difficult to obtain information on the nature of the contacts which occur between agency and contractor officials and whether proposals are informally (improperly) solicited before unsolicited proposals are submitted, such an exception would provide an easy way to avoid use of the competitive process.

As you know, S.338 would already permit the use of noncompetitive procedures when competition is not feasible on unsolicited proposals. That is, title I, section 303(e)(1) and title II, section 2304(e)(1) permit agencies to use noncompetitive procedures when "the property and services needed by the Government are available from only one source and no other type of property or services will satisfy the needs of the executive agency."

Under the present procurement statutes, unsolicited proposals are not exempted from competitive requirements when competition is feasible. For example, the Defense Acquisition Regulation (DAR 4-910) states that:

- --A favorable comprehensive evaluation of an unsolicited proposal is not in itself, sufficient justification for negotiating on a noncompetitive basis with the offeror.

- --When a document qualifies as an unsolicited proposal but the substance (1) is available to the Government without restriction from another source, or (2) closely resembles that of a pending competitive solicitation, or (3) is otherwise not sufficiently unique to justify acceptance, the unsolicited proposal shall not be acceptable.
- --When procurement is intended and competition is feasible, the proposal shall be returned to the offeror together with the reasons for the return.

NASA's procurement regulations and the Federal Procurement Regulations, which cover procurement by the civilian agencies, contain similar provisions.

GAO reviews over the past few years of contracts above the small purchase threshold awarded by the Department of Defense and major Federal civil agencies showed that numerous noncompetitive contracts based on unsolicited proposals should have been awarded competitively. For example, our review of a statistical sample of civil agencies' sole-source contracts for all types of goods and services showed that for an estimated 507 (or 66 percent) of the 767 contract awards in our universe resulting from unsolicited proposals, the contractors did not possess unique capabilities for meeting the Government's minimum requirements and competition was feasible (GAO/PLRD-82-40).

Regarding DOD contracts, we found that the Defense Nuclear Agency (DNA) awarded 781 of its 795 new contracts noncompetitively in fiscal year 1979. The vast majority of these not only were based on unsolicited proposals, but also involved contractors starting work before the contracts were signed, thus making it difficult for contracting officials to solicit additional contractors. DNA's handling of these contracts violated the intent of DOD's guidance on the use of competition (GAO/PLRD-81-45).

In addition, in our review of DOD's management support service contracts we found that 40 percent of the 256 randomly selected contracts reviewed were based on unsolicited proposals. We stated that, although unsolicited proposals should not be discouraged, all too often they have been used to (1) subvert the competitive process, (2) encourage work that may not be important relative to DOD's mission needs and priorities, (3) abrogate DOD's responsibilities over the scope and direction of work related to defense management, and (4) perform work that is not truly unique or innovative (GAO/MASAD-81-19).

When a valid requirement exists and competition is feasible, the Government's minimum requirements, along with its evaluation criteria, should be incorporated into a solicitation document, such as a request for proposal, in such a way that

--any proprietary information or unique ideas contained in an unsolicited proposal are not disclosed and

--other potential offerors have an opportunity to compete on an equal basis.

Instead of exempting unsolicited proposals from competitive procedures, we suggest a different revision to S.338 as a compromise on this issue. That is, we suggest that title I, section 313(c) and title II, section 2305(c)(3) be revised to exempt agencies from (1) conducting market research and (2) furnishing for publication in the Commerce Business Daily a preaward notice, if these procedures cannot be performed without disclosing the unsolicited proposer's original thoughts, innovative approach, solution, or other proprietary information. This provision should properly restrict the Government's market search for competitive sources to those situations in which it is appropriate. However, based on our reviews of contracts resulting from unsolicited proposals, we believe that agencies can with relatively few exceptions undertake such a market search for competitive sources to meet the Government's minimum requirements without disclosing such data.

At the request of your office, we have included as an enclosure to this letter information we collected on sample civil agency noncompetitive contract awards to eductional institutions (most of them based on unsolicited proposals) that we concluded should have been awarded competitively.

Agency head determinations that competition is impracticable

Some have advocated adding a broad or catch-all exception to S.338's requirement to use competitive procedures to cover any unforeseen circumstances, not covered under the present six exceptions, for which noncompetitive procurement would be appropriate. One suggestion is to permit the use of noncompetitive procedures when the agency head determines that competition is impracticable.

We know of only one type of situation for which the use of noncompetitive procedures is appropriate that does not appear to be covered by the six exceptions as set forth in S.338 and further explained in the Senate Committee on Governmental Affairs' report accompanying the bill.

Rather than using a broad catch-all exception for such a situation, we suggest that the bill or congressional intent specifically recognize it as an appropriate basis for using noncompetitive procedures. It involves the award of a follow-on contract for which competition is not feasible because a noncompetitive award is necessary to avoid unacceptable delays in accomplishing the agency's mission objectives. [1]

S.338's six exceptions are intended to cover all known situations in which noncompetitive procurement is appropriate. We are concerned that an additional broad exception, such as one based on impracticability, would be too easily misused if the agency head's authority is permitted to be delegated widely. In our view, this would likely negate S.338's objective of limiting noncompetitive procurement to only those situations for which it is appropriate.

Our reviews of noncompetitive contracts awarded by DOD and civil agencies have shown frequent abuses of competitive requirements. For this reason we have recommended that procurement regulations be amended to adequately describe the criteria that must be met to justify awarding noncompetitive contracts. We believe that if the procurement laws permit noncompetitive decisions to be (1) based on unspecific criteria, such as "impracticability," and (2) exercised at other than the very highest levels, this would severely weaken or defeat attempts to limit the number of unnecessary and wasteful noncompetitive contracts.

At the same time, we recognize the possibility that in a few cases unforeseen circumstances may make noncompetitive procurement appropriate, even though such action is not authorized under the more specific exception categories of S.338. Therefore, we would support a broad exception of this type only if

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[1] The Senate Committee on Governmental Affairs' report accompanying S.338 cited a couple of examples of situations for which noncompetitive procedures are specifically authorized under the first exception (title I, section 303(e)(1) and title II, section 2304(e)(1). This included the award of a follow-on production contract when the nonrecurring start-up costs incurred by the Government to establish competitive alternatives outweigh the benefits of competition. We believe that the following should be clearly recognized as a basis for the use of noncompetitive procedures. A follow-on award must be directed to a specified source because it is not feasible to obtain competition for follow-on procurements. In such a case, agency officials should be required to demonstrate that a noncompetitive award is necessary to avoid (1) duplication of costs to the Government for the item being procured (that is, a substantial investment of some kind would have to be duplicated at Government expense by another source entering the field and because of the magnitude of these costs, recovering them through competition would be highly unlikely) or (2) unacceptable delays in accomplishing the agency's mission objectives. However, the fact that the Government would incur some cost and/or delay by changing contractors is not, in and of itself, a sufficient reason for noncompetitive procurement.

- --a clear expectation is stated that such an exception would be used very infrequently,

- --the specific reasons for any use of this exception must be disclosed and justified, and

- --the authority to use this exception could not be delegated to any official more than one level below the agency head. That is, only officials at or above the level of assistant secretary of any department or a comparable level in an independent agency should be able to authorize noncompetitive procurement on a basis other than that provided by S.338's more specific exceptions.

Please let me know if we can be of any further assistance on this matter.

Sincerely yours,

Robert M. Gilroy
Senior Associate Director

Enclosure

SAMPLE CONTRACTS WITH EDUCATIONAL INSTITUTIONS ON WHICH COMPETITION WAS FEASIBLE ("LESS SOLE SOURCE, MORE COMPETITION NEEDED ON FEDERAL CIVIL AGENCIES' CONTRACTING" PLRD-82-40, 4/7/82)

U.S. Dept.	Dollars obligated (at time of our review) (note a)	GAO ref. no.	Contract number	Name of contractor (educational institution)	Based on unsolicited proposal?
Energy	$ 18,955	EW00950	DE-AC0679ET23170	University of Nevada	yes
	20,215	EW01518	DE-AC0180EI10430	University of Florida	yes
	143,112	EW02490	DE-AC0179ET14809	Brigham Young University	yes
	42,100	EW03084	DE-AC02-79ER10511	University of Delaware	yes
	200,000	EW04452	DE-AC0279-ER10518	Massachusetts Institute of Technology	yes
	114,265	EX02330	DE-AC02-79-EV10237	Brigham Young University	yes
	300,000	EX03690	DE-AC05-79ER10013	University of Florida	yes
	2,138,958	EY03280	DE-AC978-0ET46615	University of Texas	no
HHS-Social Sec. Admin.	79,000	HW01075	600790093	Catonsville Community College, Catonsville, MD	no
Interior					
Fish & Wildlife	112,995	IX01256	14-16-0009-80004	University of Washington	yes
Bureau of Mines	613,139	IX06345	J0199125	Michigan Technological University, Houston, Mich.	yes
NASA	378,200	NX00858	NAS63103	Oklahoma State University	no
	131,251	NX03335	NAS63086	University of Dayton, Dayton, Ohio	yes
Transportation	17,500	TW04924	DTUM60-80-C72026	Occidental College, Los Angeles, CA	no
					10 based on unsolicited proposals 4 not based on unsolicited proposals

Of the 198 contracts in our random, stratified, statistical sample, 32 were based on unsolicited proposals. We concluded that competition was feasible and should have been sought on 20 of these 32 contracts. (As explained on pages 11-12 of the report, we assured ourselves in each case that this conclusion was appropriate. For example, agency program and/or contracting officials generally concurred with these conclusions.) Ten of the 20 unsolicited proposals that should have been competed were from educational institutions.

a/Many of the contracts were still open and additional amounts may have been obligated after our review work was completed.

CONGRESSIONAL BUDGET OFFICE
U.S. CONGRESS
WASHINGTON, D.C. 20515

Alice M. Rivlin
Director

March 23, 1983

Honorable William V. Roth, Jr.
Chairman
Committee on Governmental Affairs
United States Senate
346 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has reviewed S. 338, the Competition in Contracting Act of 1983, as ordered reported by the Senate Committee on Governmental Affairs, March 17, 1983.

The bill revises procedures for awarding federal contracts for property and services, with the intent of increasing competition in government procurement. The potential savings from effective implementation of this legislation are substantial, but cannot be estimated with precision. Of $123 billion in contracts over $10,000 awarded in fiscal year 1981, $67 billion (54 percent) were awarded noncompetitively, with over 80 percent of these noncompetitive awards made by the Department of Defense. About $46 billion of the $67 billion in noncompetitive contracts awarded in fiscal year 1981 were for actions under existing contracts, and approximately $6 billion of the remainder were for procurements under the "Buy Indian" program and for follow-on awards after competition--leaving about $15 billion in other new contract actions.

Similar detailed data for 1982 procurements have not yet been compiled. Overall, contracts over $10,000 awarded in fiscal year 1982 totaled increased by about 20 percent, to $147 billion. Those awarded noncompetitively increased by about 18 percent, from $67 billion in 1981 to $79 billion in 1982. If the distribution of these contracts between actions under existing contracts, new contract actions, "Buy Indian" and follow-on awards was approximately the same in fiscal year 1982 as it was in 1981, then new contract actions not subject to the constraints of follow-on awards or the "Buy Indian" program would be valued at about $18 billion in 1982, and would be expected to be even larger in fiscal year 1983 and future years.

Studies by the General Accounting Office and others have indicated that savings of 10 to 50 percent can sometimes be achieved through competitive contracting. While there is no reliable methodology available to estimate total savings from the bill, such savings could be significant, because each 1 percent saved on new contract actions would save close to $200 million per year. Also, in the long term, the costs of modifications to existing contracts may also be reduced by the prospects of future competition.

Additional savings may be achieved by reducing, from $500,000 to $100,000, the threshold value of negotiated defense contracts above which cost and pricing data must be certified by the contractor. This will make the defense threshold consistent with the threshold for civilian contracts included in the Federal Procurement Regulations. The savings could result from additional assessments for contract violations, though additional audits would be required to identify such violations. The magnitude of receipts cannot be estimated and would depend on both the discovery of additional violations and the extent to which the Department of Defense increased its auditing effort.

The bill also requires the head of each executive agency to submit annual reports to the Congress in each fiscal year from 1983 through 1986. These reports will summarize actions taken to increase competition during the previous year and will outline plans for the future. The costs of producing these reports are not expected to be significant.

Enactment of this bill would not affect the budgets of state and local governments.

Should the Committee so desire, we would be pleased to provide further details on this estimate.

Sincerely,

James Blum

for Alice M. Rivlin
Director

cc: Honorable Thomas F. Eagleton
Ranking Minority Member

National Law Center
Government Contracts Program
2000 H Street, N.W.
(202) 676-6815

Professor Ralph C. Nash, Jr., Director
Professor John Cibinic, Jr.

June 3, 1983

Senator William S. Cohen, Chairman
United States Senate
Committee on Governmental Affairs
Subcommittee on Oversight of
Government Management
Washington, DC 20510

Dear Senator Cohen:

This is in response to your letter of May 23, 1983 concerning additional exceptions to the competitive procedures which would be required by S. 338. Specifically, you requested my views on the need for exceptions covering unsolicited proposals and those procurements in which the head of the agency determines that it is impractical to obtain competition.

I am opposed to the unsolicited proposal exception for the following reasons:

1. It is impractical to distinguish between true unsolicited proposals and the infamous "solicited unsolicited proposals," which in fact are suggested or requested by government personnel. H.R. 2545 attempts to resolve this by defining unsolicited proposals to exclude proposals which result from "informal agency requests." However, this would be virtually impossible to police. Most such informal requests or suggestions would take place orally and could not be documented.

2. Insufficient standards would exist to determine when the agency could use sole source procurement for unsolicited proposals. H.R. 2545 would permit such an award if the proposal "demonstrates a unique or innovative concept." "Unique" and "innovative" are not well understood and defined legal terms. As a result, too much discretion would be afforded procurement officials and abuses could easily occur. The current regulatory coverage of unsolicited proposals is far more restrictive than the coverage contained in H.R. 2545.

3. The competition exception currently in S. 338 under 10 U.S.C. 2304(e)(1) contains sufficient basis for sole source award of meritorious proposals. That exception provides that noncompetitive procedures may be used when the property or services are available from only one source and no other type of property or services will satisfy the needs of the agency. Thus, the sole source procurement would be justified on the basis of the

THE
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Government's need to contract with only that source and not because that source submitted an unsolicited proposal. This might be justified on the basis of the need to take advantage of the talents and knowledge of a specific firm or because of the proprietary data or knowhow possessed by the offeror.

4. I do not believe that the absence of a specific exception for unsolicited proposals will have a significant impact on the volume of meritorious unsolicited proposals presently received by the Government. Under the present procedures there is no assurance that an unsolicited proposal will result in a sole source award and many do not. Although an argument could be made for the desirability of increasing unsolicited proposal activity, the possibility of improper use would appear to be too great to adopt such an exception.

With respect to an additional exception for unanticipated circumstances which would not fall within one of the six exceptions contained in S. 338, I would support a waiver procedure which would be controlled at a very high level and which would require an annual report by each agency to Congress of the waivers adopted. I am opposed to a "catchall" exception such as "impractical to obtain competition." Such a broad and general exception presents too great an opportunity for abuse. The waiver procedure would permit the agency the necessary latitude to assure mission success in the event that circumstances arise where one of the six exceptions in S. 338 does not apply but where sole source procurement is necessary. However, placing the approval level at the secretarial level of each agency and not permitting delegation would limit the likelihood of abuse. Further, the annual reporting requirement would give sufficient visibility to assure Congress that abuses are not occurring.

I will expand upon these comments and other aspects of S. 338 in my prepared testimony for the hearing to be held on June 7, 1983. Should you or your staff require additional information, I would be pleased to furnish it.

Sincerely,

John Cibinic, Jr.

AMERICAN BAR ASSOCIATION

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FEB 28 '83

February 25, 1983

The Honorable William S. Cohen
Chairman, Subcommittee on Oversight
of Government Management
506 Carroll Arms
301 First Street, N.E.
Washington, D.C. 20510

Dear Senator Cohen:

In response to your letter of February 10, 1983, I am pleased to submit the following comments on S. 338, the Competition in Contracting Act of 1983, on behalf of the American Bar Association.

The ABA supports the goals and basic principles of S. 338 which emphasize the use of competitive procedures in the procurement of goods and services, prescribes criteria for the use of noncompetitive procurement procedures, and establishes requirements for procurement notices. Enclosed are suggestions for additions or changes in specific provisions of S. 338 which we believe are compatible with these principles and will improve the bill.

We would like to take this opportunity to urge the adoption of a single government-wide statute in lieu of amending the Federal Property and Administrative Services Act and the Armed Services Procurement Act. Although the amendments proposed by S. 338 would make each Act identical in the areas covered, history demonstrates that over time each Act will be subject to separate amendments that will again create differences in procurement requirements and procedures.

While S. 338 deals with a very important aspect of procurement, namely methods of procurement, we note that it does not cover a number of other important aspects of procurement that have been the subject of hearings and legislative proposals; i.e., Titles V, VI, and VII of S. 5, 95th Cong., 1st Sess. We also urge that consideration be given to expanding S. 338 to a comprehensive procurement act that will deal with all major aspects of the procurement process.

Very truly yours,

Bob Wallick

Robert D. Wallick
Chairman, Public Contract
Law Section

Enclosures

cc: Mr. Jaffrey A. Minsky
Kevin Driscoll, Esq.
Thomas Gonser, Esq.
O. S. Hiestand, Esq.

Comments on S. 338

TITLE I

Section 303

(a) Page 2, lines 12-13. Insert "in this Section" after "competitive procedures." In line 22 delete "or quotations." Add at the end of the subsection a preference for the use of commercial products and services, which will be procured with commercial terms and conditions wherever practicable.

(b) On page 2, line 25 change "in" after the word "title" to "for."

(c) Page 3, lines 8-10. As worded, this subsection does not identify what is meant by, or who shall issue, the "procurement regulations" that are to include special procedures and form for small purchases. It is important that there be one government-wide regulation.

It is not clear that this subsection authorizes the use of multiple awards for a product. Multiple awards are beneficial and should be permitted under regulations by OFPP.

(d)(1)(B) Page 3, lines 16-17. Insert "only" after "price" and delete "and other factors considered."

(e)(2) Page 4, lines 7-10. This subsection permits emergency purchases to be made on a non-competitive basis only when the government would be "seriously injured." Absent the ability to make this finding, emergency situations are subject to the competitive requirements in Section 303(a)-(d). There should be more flexibility for emergency situations. Although the standard competitive procedures will not accommodate such situations, contracting agencies should be required to get as much competition as the situation will permit. In addition, the language in (e)(2) should be clarified to reflect an intent to permit non-competitive procurement when public health and safety are critical.

Section 309

(e) Page 5, lines 22-23. This subsection establishes a statutory ceiling ($25,000) on the definition of small purchases. It would be desirable to include authority for the

the administrator of OFPP to adjust this ceiling up or down (after appropriate notice to the Congress).

Section 311

(a) Page 6, lines 6-7. This subsection provides that every solicitation shall include specifications that permit effective competition and limit restrictive provisions to the extent necessary or authorized by law. As worded it encompasses non-competitive solicitation. It is suggested that this subsection use the same language as in subsection (b), page 7, lines 1 and 2.

(b) Page 7, lines 17-24. Add a new subsection (c) requiring a statement of all factors which will be considered in the evaluation.

Add a new subsection (d) providing criteria for the acceptance and rejection of unsolicited proposals.

Section 312

(a) Page 8, line 2. Add "only" between "based" and "on."

(b) Page 8, lines 5-8. In line 6 add "and the solicitation cancelled only" after "rejected." On line 7 add "the agency head determines that for cogent and compelling reasons" before "such action."

(c) Page 8, lines 13-16. Delete all after "bidder" on line 13 and substitute "submitting the lowest evaluated price whose bid conforms to the solicitation."

(d)(2) Page 9, lines 4-8. The language should be clarified to indicate that all offerors must have the same opportunity for discussion. Also add language prohibiting the use of auction techniques or otherwise discussing strengths or weaknesses in competitors proposals. This subsection also should include a requirement for a common cut-off date for "best and final" offers.

Section 313

(a)(2) Page 10, line 15. This subsection provides authority for OFPP to lower the minimum price. It will be important that OFPP's statute be renewed in order to carry out this function.

(b)(1) Page 10, lines 22-23. This subsection requires a procurement notice to be published as early as practicable and at least 30 days prior to the date for receipt of bids or proposals. As drafted this provision can result in unnecessary challenges due to the uncertainty of "as early as practicable" and also because of the mandatory minimum of 30 days. It would be preferable to authorize the Administrator of OFPP to prescribe notice requirements by regulation. This would permit flexibility for different types of contracts, avoid needless publications, and enable adjustments to be made in the requirements based on experience and without involving the difficulties of a statutory amendment.

(b)(1)(B)(iii) Page 11, line 10. This subsection refers to a "quotation" in addition to a bid or proposal. Suggest "quotation" be deleted.

(c) Page 11, lines 19-24, and page 12, lines 1 and 2. The exceptions to the procurement notice requirements do not include awards resulting from unsolicited proposals.

Section 304, pages 13-15. The bill adds a new subsection (d) providing for the use of "cost or pricing data." The language appears to be that presently contained in the Armed Services Procurement Act (ASPA). In lieu of the ASPA language, the enclosed "Price Data, Cost Data and Analysis" provision is recommended.

Also include a section authorizing multi-year contracts comparable to that now contained in the ASPA.

TITLE II

The comments on Title I are equally applicable to the corresponding provisions in Title II. In addition, it is suggested the enclosed provision pertaining to Price Data and Cost Data be substituted for the existing provision in the ASPA.

Enclosure 1

Price Data, Cost Data and Analysis

(a) (1) The term "price data" means actual prices previously paid, contracted, quoted, or proposed, for materials or services identical or comparable to those being acquired, and the related dates, quantities, and item descriptions which prudent buyers and sellers would reasonably expect to have a significant effect on the negotiation of a contract price or payment provisions.

(2) The term "cost data" means all facts which prudent buyers and sellers would reasonably expect to have a significant effect on the negotiation of a contract price or payment provisions. Such data are of a type that can be verified as being factual, and are to be distinguished from judgmental factors. The term does, however, include the facts upon which a contractor's judgment is based.

(3) The term "price analysis" means the process of examining and evaluating a price without evaluation of the individual cost and profit elements of the price being evaluated.

(4) The term "cost analysis" means the element-by-element examination and evaluation of the estimated or actual costs of contract performance, and involves analysis of cost data furnished by an offeror or contractor and the judgmental factors applied in projecting from such data to the offered price.

(b) When using other than sealed bid procedures, the contracting officer shall obtain price data and shall use price analysis techniques to analyze and evaluate the reasonableness of a prime contract price or of a price adjustment pursuant to a modification thereto where --

(1) the price is expected to be $500,000 or less;

(2) the price is based on an established catalog or market price of a commercial item sold in substantial quantities to the general public; or

(3) there has been a recent comparable competitive acquisition.

shall be adjusted to exclude any significant sums by which it may be determined by the contracting officer that such price was increased because of reliance on data which were inaccurate, incomplete, or noncurrent as of the date of submission or other date agreed upon between the parties (which date shall be as close to the date of agreement on the negotiated price or payment provisions as is practicable).

(h) The requirements of this section shall not apply to contracts or subcontracts where the price is based on adequate price competition, prices set by law or regulation, or, in exceptional cases, where the head of the agency determines that the requirements of this section may be waived and states in writing his reasons for such determination. Adequate price competition exists if offers are solicited and received from at least two responsible offerors, who can satisfy the requirements.

(c) In the case of subcontracts, when any of the conditions in subsection (b) apply, price data shall be obtained and price analysis techniques shall be used to analyze and evaluate the reasonableness of --

(1) a subcontract price -- where evaluation of a subcontract price is necessary to insure the reasonableness of the prime contract price, or

(2) a subcontract price adjustments pursuant to a prime contract modification.

(d) Except as provided in subsection (b)(2) and (3), cost data shall be obtained and cost analysis techniques shall be used to analyze and evaluate the reasonableness of prices --

(1) whenever either the price of a prime contract, awarded under other than sealed bid procedures, is expected to exceed $500,000; or

(2) for any subcontract price or price adjustment pursuant to a modification thereto in excess of $500,000 which forms part of the price of a prime contract awarded under other than sealed bid procedures or higher tier subcontract price.

(e) Notwithstanding subsection (b)(1) hereof, the contracting officer may obtain cost data and use cost analysis techniques only when the head of the agency determines in writing that due to particular circumstances, cost data and cost analysis are necessary to evaluate the reasonableness of the price.

(f) Contractors and subcontractors shall submit in writing such data as are required to be obtained pursuant to this section. The Administrator of the Office of Federal Procurement Policy may authorize identification in writing of data, in lieu of actual submission.

(g) Any prime contract or subcontract or modification thereto for which cost data are required by subsection (d) shall contain a provision that the price to the Government, including profit or fee,

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President

7 March 1983

The Honorable
William S. Cohen
Chairman
Subcommittee on Oversight of
Government Management
Committee on Governmental Affairs
SD-346
Washington, DC 20510

Dear Mr. Chairman:

This is in reply to your letter of February 10, 1983 in which you requested the comments of the National Security Industrial Association (NSIA) regarding S. 338.

NSIA is a national organization of more than 300 manufacturing, research and service companies of all sizes and from all segments of industry interested in and related to our nation's security. NSIA serves essentially as a two-way communications medium between government - primarily defense - and the industry which supports it.

In support of our national security interests, NSIA has been actively involved in the decade-long effort to modernize the procurement laws, starting with active participation in the Commission on Government Procurement recommendations and continuing as a contributor to all subsequent attempts to update the system. We are gratified that this effort may now be reaching fruition because of the broadening support in the Congress for such action.

In reviewing the details of S. 338 we perceive four major areas where the legislation differs from our views. First, for some time we have believed that there is a lack of recognition that competitive negotiation is equal to formal advertising in its ability to obtain reasonable prices for the Government for needed goods and services. While the bill recognizes that competitive negotiation can be distinguished from sole source contracting, we believe that the bill continues the current mandate for the use of formal advertising by requiring that "sealed bids" procedures be used in preference to negotiated procurement. We do not consider that there should be any preference for one type of competition over the other.

Second, it is in the interest of the Government to encourage its citizens to devise innovative and unique concepts to meet government requirements. Often, unsolicited proposals provide information not otherwise available to the Government, and identify unique solutions to Government needs. Consequently, Government agencies should be authorized to receive unsolicited proposals, and when such proposals reveal innovative or unique concepts, to negotiate legally in the Government's interest a sole source contract to the proposer. To accomplish this, we believe that the language in the attachment will achieve the requisite balance between the Government's need to foster competition and its need for innovation.

Third, your bill permits agency heads to conduct discussions with offerors subsequent to the submission of proposals. Unless Congress restricts the extent of post-submission discussion, agencies are able to engage in auctioneering or the practice of requiring the submission of multiple "best-and-final" offers. Proposals represent the offeror's best estimate of the factors, including price, required to perform the work solicited. Multiple "best-and-final" offers serve to distort that best estimate and could lead to delay, unrealistic prices, buy-ins, cost overruns and claims. The bill would be improved if language on post submittal discussion was limited to minor clarification and specifically prohibiting multiple "best-and-final" offers and autioneering.

Finally, in our opinion, the requirement to establish an "Advocate for Competition" within each executive agency may be counter-productive and is redundant. Once an individual position is predicated on ensuring a predetermined result, a quota system will evolve overriding the application of sound procurement judgment on the merits of each case. We believe that there is sufficient oversight of the federal procurement process by the Congress, the Inspectors General, the newly installed executive agency Acquisition Executives and the General Accounting Office to ensure that the benefits of competitive procurement are fully exploited.

We recently were requested by Congressman Stratton to provide our recommendations with regard to those amendments necessary to Chapter 137 of Title 10 to update the acquisition system to meet contemporary needs. In preparing our response to Congressman Stratton we reviewed your proposed S. 2127 from the last Congress and included many of its features although in somewhat different language. A copy of our reply is enclosed for your consideration.

We believe that the suggestions made in the enclosure can be readily adapted to provide corresponding amendments to the Federal Property and Administrative Services Act and satisfy the concerns expressed above. We would be glad to prepare for your use line-by-line suggested changes if it would be helpful.

We appreciate the opportunity you have provided to express our views on this very important subject. We would be pleased to assist you or your staff in any way to further this effort.

Sincerely,

Wallace H. Robinson, Jr.
President

WHR/md
encl.

CBEMA

March 9, 1983

The Honorable William S. Cohen
United States Senate
1251 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Cohen:

The Computer and Business Equipment Manufacturers Association (CBEMA) appreciates the opportunity to provide comments on the Competition in Contracting Act (S. 338).

We support S. 338 because it would establishes as Congressional policy that competitive procedures are required to be used whenever possible in awarding Federal contracts for property or services. We applaud your recognition that there are two types of competitive procedures which would allow executive agencies to either invite sealed bids and make awards without discussion (formal advertising) or request competitive proposals and make awards with discussion (competitive negotiation) whichever is more conducive to the conditions of the acquisition and contract.

We are pleased with your recognition that contracts for complex items cannot be reasonably awarded solely on the basis of price without discussion with the offeror, but rather should be evaluated and awarded on a lowest total overall cost basis and with comprehensive discussions with the offeror. For CBEMA member companies who manufacture high technology computers and office equipment, this concept is vital.

The Federal Government uses several methodologies to procure products and services from the members of our industry. Quite frequently in computer acquisitions, the Government states its needs broadly to encourage the largest number of responses. CBEMA member companies respond with competitive proposals and negotiations follow to clarify the substance and terms of the proposed solutions.

A second methodology employed by the Government is GSA's Federal Supply Program. CBEMA has always believed that awards under the Federal Supply Schedule are also the result of competitive forces. Competitive forces in the Federal Supply Schedule program were at work long before the product hit the marketplace. Price competition was designed into the product - in its physical and performance characteristics. Its continued existence in the commercial marketplace is dependent on its ability to remain competitively priced. This competition is inherent in commercial products and is present regardless of the method of procurement. It allows the Government user to select the products based on merits which best meet his needs at the lowest total cost to the Government.

It is our understanding from discussions with your staff that the legislative

Computer and Business Equipment Manufacturers Association 311 First Street, N.W., Suite 500, Washington, D.C. 20001 (202) 737-8888

record will clearly show that contracts awarded under the Federal Supply Schedule are the result of a competitive procedure. We are pleased that the subcommittee has implicitly recognized this inherent competitive nature of commercial products in its treatment of them under "Cost and Pricing Data", Sec. 102 (d)(4). However, CBEMA believes that this recognition should be strengthened by a simple wording change in this paragraph by changing line 10 on page 15, the first line at (d)(4) to read, "The requirments of this subsection shall not be" rather than "The requirements of this subsection need not be."

Thank you for the opportunity to provide comments and if we can be of any further assistance, please let me know.

Sincerely,

Vico E. Henriques
President

VEH/gk

SAMA

1101 16TH STREET, N.W. WASHINGTON, D.C. 20036 (202) 223-1360

March 15, 1983

The Honorable William S. Cohen
S. Hart Building, Room 530
Washington, DC 20515

Dear Senator Cohen:

The Scientific Apparatus Makers Association (SAMA) appreciates the interest of you and your staff in receiving our views on S. 338, the "Competition in Contracting Act of 1983."

To put our comments in perspective, it is important to keep in mind that SAMA is a national trade association representing the leading firms engaged in the design, manufacture, and distribution of over 40,000 types of high technology instruments and related products. This equipment is used in research, measurement, analysis, testing and control by government, industry, education, public utilities, and health care professions.

The industries represented by SAMA are essentially commercially oriented. We are not heavily dependent upon the government for our sales, employment and profits. In fact, only about 12 percent of our industries' sales can be attributed to sales to the U.S. government.

SAMA strongly supports the thrust of S. 338; that being to provide Congressional policy aimed at increasing competitive procurement in Federal contracting. We are especially supportive of the bill's recognition that competitive procurement can take one of two forms, either formally advertised or competitively negotiated, whichever is more conducive to the conditions of the acquisition and contract.

As you are well aware, the Federal government uses several methodologies to procure products and services from our industries. The one most frequently used is the Federal Supply program.

SAMA has always believed that awards under this program are the result of competitive forces at work in the commercial market. The program itself allows the government user to select the products based on merits which best meet his needs at the lowest total cost to the government.

It is our understanding from discussions with your staff that the legislative record will clearly show that contracts awarded under the Federal Supply Schedule are the result of a competitive procedure. We are pleased that the Subcommittee has implicitly recognized this inherent competitive nature of commercial products in its treatment of them under "Cost and Pricing Data" Section 102 (d) (4). However, SAMA believes that this recognition should be

SCIENTIFIC APPARATUS MAKERS ASSOCIATION

strengthened by a simple wording change in this paragraph by changing line 10 on page 15 of this bill. The first line at (d)(4) to read, "The requirements of this subsection shall not be" rather than "The requirements of this subsection need not be."

We are concerned that S. 338 apparently requires that all solicitations be accompanied by a type of specificiation. If this is the case, we are concerned that this blanket authority for GSA (and other government agencies as well) to promote specification-type procurements will be misused. SAMA's basic position is that for the types of products bought under Federal Supply Schedule contracts and because of the way the system is designed, using specifications stifles competition and severly limits the quality and availability of products offered to the government.

One other aspect of S. 338 on which we want to comment is the proposal that the Secretary of Commerce announce solicitations for contracts over $25,000 in the Commerce Business Daily (CBD). Since any figure below this amount will be considered "small purchases," many small businessmen would undoubtedly want to bid. However, they will have no reliable source on which they can depend to learn of the availability of these smaller contracts if they are not publicized in the CBD. We are aware that the bill would authorize the administrator of the Office of Federal Procurement Policy (OFPP) to set a lower figure for announcing contracting opportunities. But, we fear this is a prolonged procedure and that too much is left up to agency discretion. Further, since OFPP is to come under "sunset review" shortly, there is a question as to the agency's continued ability to effectively handle such a fragmented responsibility as this if they lost funds or experienced a reduction in staff.

Thank you for the opportunity to provide our comments. If we can be of any further assistance to you, please let me know.

Very truly yours,

Eben S. Tisdale

Eben S. Tisdale
Director of Public Affairs

EST/dr

BY THE COMPTROLLER GENERAL

Report To The Honorable Stephen Solarz
House Of Representatives

OF THE UNITED STATES

DOD Loses Many Competitive Procurement Opportunities

DOD awarded an estimated $289 million in fiscal year 1979 contracts without obtaining available competition. Contracting officers often acquiesced to inappropriate noncompetitive procurement requests from headquarters or accepted, without adequate support, assertions made by technical and end-user personnel. In all cases where competition should have been obtained, contracting officers failed to follow proper contracting procedures to make sure that only one company could satisfy the procurement request.

GAO recommends that the Secretary of Defense clearly specify the factual support needed to justify noncompetitive procurements, develop service plans establishing objectives for improving competition, and implement a system for monitoring procurement office progress in achieving these goals.

UNITED STATES GENERAL ACCOUNTING OFFICE

PLRD-81-45
JULY 29, 1981

COMPTROLLER GENERAL'S
REPORT TO THE HONORABLE
STEPHEN SOLARZ
HOUSE OF REPRESENTATIVES

DOD LOSES MANY COMPETITIVE PROCUREMENT OPPORTUNITIES

DIGEST

Both the Congress and the Department of Defense (DOD) are concerned about the continuing and worsening trend in noncompetitive DOD procurements. In past studies, GAO reviewed noncompetitive procurements of items, such as spare parts, that are bought repetitively from the original manufacturer of the end item. GAO usually found that the Government lacked or had not taken the time to develop purchase descriptions needed to invite competitive bids and that opportunities existed to develop these descriptions to obtain competition. GAO plans to continue studying competitive opportunities in this large universe of repeat noncompetitive procurements.

In response to Congressman Solarz' November 16, 1979, request as Chairman, Task Force on Government Efficiency, House Committee on the Budget, GAO studied other opportunities for introducing competition in DOD procurements. After discussions with the Chairman's office, GAO focused on noncompetitive procurements of goods and services which had not been previously purchased. This universe represents $5.3 billion of a total $39.5 billion in fiscal year 1979 noncompetitive procurements. GAO analyzed a random sample of goods and services purchased by DOD agencies for the first time in fiscal year 1979 and studied the decision process which led to noncompetitive buying. GAO concluded that 25 of the 109 contracts in its sample had been inappropriately awarded noncompetitively. Each of the 25 contracts was valued at less than $1 million. On the basis of this study, GAO estimates that about $289 million of the noncompetitive procurements of items bought for the first time in fiscal year 1979 could have been competitive. Because adequate statistical information was unavailable, GAO could not determine how much could have been saved through the additional competition. However, several studies have indicated that as much as 25 percent can be saved through increased competition. (See p. 5.)

PLRD-81-45
JULY 29, 1981

Although GAO found that a large number of noncompetitive contracts could have been competitive, this was not in itself a significant cause of the fiscal years 1972 to 1978 decline in price competitive spending as a percentage of DOD's procurement budget. The primary reasons for this decline were

--increased spending on and a concurrent loss of competition for petroleum and nuclear submarines,

--increased use of design and technical competition for major weapon systems, and

--greater emphasis on "set asides" for businesses owned and controlled by socially or economically disadvantaged persons. (See pp. 11 to 14.)

Contracting officers are responsible for maximizing competition. However, in all 25 procurements where GAO determined that competition should have been obtained, contracting officers failed to follow sound contracting procedures to ensure that only one company could satisfy the procurement requirements. In over 70 percent of these cases, contracting officers acquiesced to specific procurement requests from headquarters, or accepted, without adequate support, assertions made by technical and end-user personnel that justified noncompetitive procurements. Major processing deficiencies included

--improper use of the public exigency exception,

--inadequate performance of market research,

--insufficient development of data package to ensure competition, and

--use of procurement specifications which did not represent the Government's minimum needs. (See pp. 4 to 10.)

GAO also determined that the Defense Nuclear Agency's use of early starts and unsolicited proposals inhibited competition. (See pp. 15 to 18.)

DOD recently required the services to develop plans to improve their competitive performances. These plans, however, do not specifically address the contracting problems identified in this report. (See p. 10.)

RECOMMENDATIONS

To reduce inappropriate noncompetitive procurements, GAO recommends that the Secretary of Defense:

--Provide to contracting officers and program personnel more specific guidance on the factual support needed to justify noncompetitive procurements.

--Require the services to establish percentage improvement goals and address contracting problems discussed in this report in their plans for improving competition.

--Establish a systematic approach for monitoring procurement office goals and reviewing selected contracts and documentation to assure they were appropriately awarded.

--Require the Defense Nuclear Agency to justify its use of early starts and unsolicited proposals as a way of contracting. (See pp. 20 and 21.)

AGENCY COMMENTS

DOD agreed with the thrust of GAO's recommendations concerning the need to justify noncompetitive procurements and the need for the Defense Nuclear Agency to strengthen its contracting procedures. However, DOD did not believe that contracting officers and program personnel required more specific guidance on the factual support needed to justify noncompetitive procurements. DOD also disagreed with GAO's recommendations which relate to establishing and monitoring percentage goals for improving competition. GAO continues to believe that providing specific guidance and establishing competitive goals are necessary because GAO's findings demonstrated that DOD's current guidance and review procedures did not adequately ensure competitive procurement whenever feasible. (See pp. 21 and 22.)

CHAPTER 1

INTRODUCTION

Although competitive solicitations are the preferred method for obtaining offers to supply Government needs, currently, about two-thirds of the value for all Department of Defense (DOD) procurements are noncompetitive. Out of a total of $62.1 billion awarded by DOD in fiscal year 1979, $22.6 billion was awarded competitively and $39.5 billion was negotiated without competition. This level of noncompetitive awards represents a 5.1-percent increase since 1972 in noncompetitive awards as a proportion of all DOD awards. Both DOD and the Congress are concerned about the continuing and worsening trend in noncompetitive procurements.

DOD uses formal advertising and negotiation as the two basic procedures for purchasing goods and services. The Armed Services Procurement Act of 1947 requires DOD to procure by formal advertising whenever it is feasible and practical. According to the act, when a procurement is formally advertised, contracting officers should award the resultant contract without negotiation to "that responsive and responsible bidder, whose bid will be most advantageous to the Government, price and other factors considered."

The law also establishes 17 exceptions to the use of formal advertising, which provide Government contracting officers with the authority to negotiate. Generally, contracting officers must develop written justifications supporting a decision to negotiate rather than to formally advertise.

While formal advertising is always competitive, negotiated awards may be either competitive or noncompetitive. In cases where formal advertising is neither feasible nor practical, contracting officers may negotiate to obtain competition for the best price or the best design and/or technology within an acceptable price range. The following chart shows the distribution of DOD's fiscal year 1979 competitive awards.

Competitive Awards

Total	Formally advertised	Competitive negotiations	
		Price	Design & technical
-(billions)-			
$22.6	$4.1	$12.7	$5.7

Note: Total does not add due to rounding.

Although the Congress has consistently advocated maximum use of competition, negotiated awards made without competition have historically represented a much larger portion of the total DOD procurement dollar. A large portion of these noncompetitive awards--called follow-on contracts--are the result of subsequent procurements from original contractors where past decisions have dictated contracting with particular firms. Follow-on contracts to ones awarded competitively are recorded separately by DOD as follow-on after price competition and follow-on after design and technical competition. The remainder of DOD's noncompetitive awards and the largest group--called other-one-source-- are neither competitive nor follow-on after competition. The following chart depicts the distribution of DOD fiscal year 1979 noncompetitive procurements.

Noncompetitive Awards

Total	Follow-on after price & after design & technical competition	Other-one-source
- - - - - -	(billions)	- - - - - -
$39.5	$10.8	$28.7

All procurement actions are either new procurements or actions under existing contracts, such as modifications. These later actions are generally given the same competitive classification as the original contract. Thus, after discussions with the Chairman's staff, we agreed to focus on those new procurement actions that were neither competitive nor follow-on after competition. The total dollar value of all new fiscal year 1979 contracts was $5.3 billion. Many other noncompetitive areas of the DOD procurement budget need reviewing. We therefore will be conducting future studies to identify additional competitive opportunities.

OBJECTIVES, SCOPE, AND METHODOLOGY

This report is in response to Congressman Solarz' November 16, 1979, request as Chairman, Task Force on Government Efficiency, House Committee on the Budget (see app. III). He wanted us to assess whether DOD obtained competition whenever feasible. We reviewed a random statistical sample of 109 new noncompetitive fiscal year 1979 contracts valued at $941 million. We analyzed Army, Navy, Air Force, Defense Logistics Agency, Defense Nuclear Agency, and National Security Agency contracts to determine whether

--competition could have been obtained;

- --DOD had adequate management controls to minimize noncompetitive procurements; and

- --improvements were needed in regulations, policies, and/ or practices to maximize competition.

We are 95-percent confident that our projectable results are accurate to within $143 million; that is, the actual value of noncompetitive procurements which could have been competed may be $143 million higher or lower than the projection. (See app. I for sampling strategy.) Specific examples used in the report are representative of the types of situations inhibiting competition. Our analysis does not project potential dollars that could be saved through the additional competition because accurate statistical information was unavailable. 1/ In addition, for convenience of presentation, most dollars and percentages were rounded. We limited our universe to new definitive noncompetitive contracts over $10,000 because (1) we had a greater chance of identifying competitive opportunities for this contract type and (2)the data base does not include contracts under $10,000. In addition, we separately reviewed the reasons for the 8-percent decline in competition between fiscal years 1972 and 1978.

1/Several studies have indicated, however, that as much as 25 percent can be saved through increased competition.

CHAPTER 2

POOR CONTRACTING PROCEDURES RESULT IN LOST OPPORTUNITIES TO OBTAIN COMPETITION

In 25 of the 109 noncompetitive contracts reviewed, we found that contracting officials did not follow sound contracting procedures and thus lost the opportunity to obtain competition even though it was available. The Defense Acquisition Regulation requires contracting officers to take certain steps to maximize competition. When the officers do not take these steps, they risk paying too much for goods and services. In total, our statistical projection shows that $289 million (or a range between $146 and $432 million) in new noncompetitive contracts awarded by DOD in fiscal year 1979 could have been competitive. In over 70 percent of the cases where competition should have been obtained, contracting officers relied upon procurement requests for sole-source procurements from headquarters or accepted, without adequate support, technical and end-user personnel assertions that only one source was available.

In 1979 the services and the Defense Logistics Agency developed plans to improve competition. Except for the Defense Logistics Agency's plans, however, none of the plans address the contracting problems identified in this chapter.

CONTRACTING OFFICERS ARE REQUIRED TO OBTAIN COMPETITION WHENEVER POSSIBLE

The Defense Acquisition Regulation specifically directs DOD contracting officers to maximize competition in buying goods and services through formal advertising and negotiated price competition.

Contracting officers should assure themselves that

--all procurements, whether by formal advertising or by negotiation, are made on a competitive basis to the maximum practicable extent;

--if the use of formal advertising is not feasible and practicable, contracts for goods and services are properly justified and negotiated under 1 of 17 specific exceptions to formal advertising; and

--if the use of formal advertising is feasible and practicable, contracts for goods and services are to be awarded by formal advertising, even if specific exceptions might otherwise allow a purchase to be negotiated.

When a proposed procurement appears to be noncompetitive, the contracting officer is responsible not only for assuring that competition is not feasible but also for taking those actions needed to avoid subsequent noncompetitive procurements. Such actions should include examining the reasons for the procurement being noncompetitive and identifying steps to foster competitive conditions for future procurements. Thus, buying noncompetitively should be used only when all attempts to obtain competition have failed.

DOD AWARDED SEVERAL HUNDRED MILLION DOLLARS IN FISCAL YEAR 1979 CONTRACTS WITHOUT OBTAINING AVAILABLE COMPETITION

DOD lost opportunities to obtain available competition on an average of $289 million in new noncompetitive contracts in fiscal year 1979. We based this projection on our determination that 25 of the 109 contracts analyzed should have been competed. Since this figure represents a statistical projection, the actual dollar value of inappropriate noncompetitive procurements may be more or less than this amount. Although we could not determine the actual dollars that could have been saved through competition, several studies have indicated that as much as 25 percent can be saved through competition.

A common element among all the inappropriate procurements was their relatively small dollar value. All the inappropriate procurements involved contracts under $1 million. These smaller procurements represented a large portion of DOD's new noncompetitive contract awards. The following table shows the relationship of small procurements to total procurements.

FY 1979 New Definitive Noncompetitive Contract Awards Over $10,000

Contract value	No. of contracts	Percent of total contracts	Total dollars	Percent of total dollars
			(billions)	
less than $1 million	17,041	97	$1.1	21
more than $1 million	441	3	4.2	79

REQUESTS FOR SPECIFIC GOODS AND SERVICES PREEMPT COMPETITIVE PROCUREMENT PROCESSES

Contracting officers are responsible for ensuring competition when buying goods and services. However, we found instances where headquarters commands, technical personnel, and end users of these goods and services specifically directed or influenced contracting officers to buy certain items noncompetitively.

Headquarters commands influence procurement practices

Requests from headquarters commands or high-ranking DOD officials for the purchase of specific goods or services accounted for 4 of the 25 inappropriate noncompetitive procurements in our review. These requests represent a direct type of pressure since the requestors are in a higher position within the organization than the contracting officers. This boss-employee relationship naturally inhibits or prevents contracting officers from strongly objecting to inappropriately directed noncompetitive procurements.

For example, in September 1978, the Military Airlift Command (MAC) headquarters found that the design plan for a new building at Charleston Air Force Base (AFB), South Carolina, had not included provisions for a floor sealer. MAC directed base contracting officials to remedy the problem by purchasing a polyurethane concrete floor sealer from a particular company noncompetitively and to use the public exigency exception to justify negotiating. The contract was valued at $15,000.

Although the Defense Acquisition Regulation states that the public exigency exception should be used only when the Government may suffer serious injury through delays resulting from formal advertising, the negotiation justification did not elaborate on the nature and extent of this injury. The contracting office bought the sealer as directed, without performing a market analysis to determine whether qualified suppliers were available.

We identified at least four other companies that marketed floor sealers which would have met the base's needs. Two of these companies had contracts with the General Services Administration and were listed in the agency's Industrial Products Catalog. In addition, Warner Robins AFB had used formal advertising in March 1978--7 months before the MAC contract was signed--to obtain a comparable sealer from a different manufacturer. Because the contracting officials did not challenge the sole-source directive from MAC, the contract was inappropriately awarded noncompetitively. Other suppliers were available and enough time existed to formally advertise.

Inappropriate reliance on technical personnel

Although the Defense Acquisition Regulation does not prohibit technicians, scientists, and other specialists from assisting contracting officers by recommending certain products or companies, contracting officers ultimately are responsible for ensuring that competitive procurements are maximized. Despite this, 10 of the 25 contracts which should have been competitive resulted from contracting officers relying totally on inappropriate noncompetitive procurement recommendations from technical personnel.

We were told that contracting officers did not believe they were qualified to question noncompetitive procurement recommendations. They assumed, for example, that technical personnel were more aware of markets corresponding to their specialties. Further, the contracting officers believed that they lacked the technical background to question recommended noncompetitive procurements. Neither of these reasons, however, justifies the contracting officers accepting noncompetitive procurement recommendations without doing market analyses or without using proper competitive procurement processes.

For example, the National Security Agency based an inappropriate noncompetitive procurement of tape recorder head assemblies on its engineer's statement that only one company manufactured the required assemblies. Agency contracting officials assumed that the engineer was aware of the market for tape recorder head assemblies and, on the basis of his recommendation, awarded a contract for $19,426 to the specified company without obtaining available competition.

After this procurement, agency contracting officials identified other companies which could have manufactured tape recorder head assemblies to meet the agency's needs. In addition, we were able to locate nine companies that produced tape recorder head assemblies--including one firm which advertised that it would design and fabricate to any requirement.

Contracting officials accept end-user judgments without adequate support

Requests from end users for the purchase of specific goods or services accounted for 4 of 25 inappropriate noncompetitive procurements in our sample.

The problems associated with end-user judgments are similar to those for technical specialists; that is, contracting officers are accepting unsubstantiated judgments and comments about the qualifications of particular contractors and the availability of competition. Contracting officers believe that the end users are in a better position to know the market and contractor capabilities. However, this perception may be inaccurate. More important, contracting officers are abrogating their responsibilities by relying totally on end-user judgments when there is no factual support. The following example demonstrates the problem.

The San Antonio Contracting Center based an inappropriate noncompetitive procurement of a heart monitoring system on a physician's request. The Center bought a heart monitoring system costing $46,908 for the Air Force's School of Aerospace Medicine from a specific company because the school's Chief of Internal Medicine had said that only one company distributed a system with the required performance characteristics. However, we identified two additional companies which sold equipment comparable in design and price to the equipment purchased.

The written justification for this procurement stated that the desired heart monitoring system was the only known system capable of (1) performing an automatic trend analysis of arrhythmias and (2) scanning more than one channel of data at a time. These two functions were considered the minimum requirements for detecting abnormal electrocardiographic information. The Center's contracting officer said that he did not question this justification because he was not medically qualified to do so and that contracting personnel must rely on the professional judgment of medical personnel. The Chief of Internal Medicine, after contacting only two companies, concluded that only one company was capable of providing the needed system.

We contacted representatives of several medical equipment supply companies and identified two alternative sources of supply for heart monitoring systems. Both systems had functions meeting DOD's minimum requirements. We obtained performance specifications for one of the company's systems and had the Chief of Internal Medicine review them. He agreed that the system met the Government's minimum needs. Thus, because contracting officials relied solely on the end user's request for the product, they lost an opportunity to obtain available competition.

OTHER CONTRACTING PROCEDURES ARE NOT BEING FOLLOWED

In addition to demonstrating pressures on contracting officers, the above examples show the resulting failure of contracting officers to perform adequate market research and to properly use the public exigency exception. Contracting officers also did not always follow proper contracting procedures when (1) establishing a procurement's minimum requirements and (2) developing a data package sufficient to ensure competition.

The Sacramento Army Depot published product requirements exceeding minimum needs

The Sacramento Army Depot, Sacramento, California, used specifications which exceeded its minimum needs. As a result, it bought 20 closed-circuit TV systems for $153,000 noncompetitively, even though other competitors offered products that met the Army's needs. Specifically, system requirements for camera weight and picture resolution did not necessarily represent the Army's minimum needs.

The Army established 3 pounds, plus or minus 0.5 pounds, as its minimum weight need. However, its only desire was to buy a camera that did not unnecessarily hamper a soldier's ability to do basic tasks. Army officials agreed that cameras weighing less than 2.5 pounds or more than 3.5 pounds might work as well. Thus, the camera weight, as stated on the noncompetitive certification, represented only a desired weight, not the Army's minimum needs.

On the basis of testing two cameras, one having a line resolution of 600 and the other 800, the Army determined that a 600-line resolution camera did not meet its needs. The Army then established 800 as the required line resolution. However, it did not test resolutions between 600 and 800. The possibility exists, and the Army agreed, that other cameras with resolutions of less than 800 but more than 600 probably could do the job.

Because the camera weight and line resolution appeared as fixed requirements, the Army contracted noncompetitively despite the availability of other cameras that might have done the job.

The Defense Construction Supply Center, Columbus, Ohio, inhibited competition by not obtaining available data package

The Defense Construction Supply Center, Columbus, Ohio, bought 2,100 flanges 1/ for $41,000 noncompetitively from General Motor's Detroit Diesel Allison Division. Even though the Government had unlimited data rights, Supply Center officials simply did not obtain information necessary for a competitive procurement.

The Supply Center's data package did not identify two basic elements necessary to obtain competition--the flanges' metal composition and the heat treatment process used during their

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1/These flanges are replacement parts for the F-4 aircraft.

manufacture. Of the 12 firms which were sent bid packages, only Detroit Diesel submitted a proposal. Supply Center officials said that this missing information limited competition, and that with it, they could have formally advertised. However, since they considered Detroit Diesel's flange price reasonable, no additional competition was considered necessary. Accordingly, the Supply Center did not attempt to obtain the missing data nor did it plan to get the data for future procurements. However, after our review, the Supply Center acquired the necessary data to use for obtaining competition.

SERVICEWIDE PLANS TO IMPROVE COMPETITION DID NOT IDENTIFY PROBLEMS WITH SMALLER DOLLAR PROCUREMENTS

In response to a June 1979 request by the Deputy Secretary of Defense, the Secretaries of each service and the Director of the Defense Logistics Agency developed plans to improve competition. For example, the Army planned to reassess the level of review and approval for sole-source determinations. Further, it directed the Army Inspector General and acquisition management review activities to include noncompetitive contracts as items of special interest in their audits. The Navy's plans included providing guidance to acquisition managers and contracting personnel on methods of increasing competition, including parallel development, leader-follower arrangements, and use of reprocurement data packages. The Air Force's plans called for establishing goals to increase competition in each major acquisition area. Finally, the Defense Logistics Agency planned to emphasize to contracting personnel the possibility of securing competition by using alternate solicitation techniques or contract types. Except for the Defense Logistics Agency plans, none of the plans specifically addressed inappropriate noncompetitive contracts for goods and services valued between $10,000 and $1 million.

CHAPTER 3

MAJOR POLICY, PROGRAM, AND FUNDING CHANGES ACCOUNT FOR COMPETITIVE DECLINE

Although our statistical sample shows where additional competitive opportunities existed in fiscal year 1979 contracts, it does not totally explain the 8-percent decline in price competitive procurements between fiscal years 1972 and 1978. The primary reasons for this decline were

--increased spending on and a concurrent loss of competition for procurement of petroleum and nuclear submarines,

--increased use of design and technical competition for major weapon systems, and

--greater emphasis on "set asides" for businesses owned and controlled by socially or economically disadvantaged persons.

A FEW COMMODITIES EXPLAIN MOST OF THE COMPETITIVE DECLINE

Declines in the rate of competition and increased obligations for procurements of fuels and nuclear submarines explain about 64 percent of the relative decline in price competitive procurements. The oil embargo had a dramatic impact on DOD's ability to obtain competition for fuels, and the noncompetitive procurement of Trident submarines was another major contributing factor causing the decline.

Loss of competition for fuels explains about 40 percent of the decline

In 1973 the oil embargo substantially changed the market for refined petroleum procurements. In fact, shortly after the embargo, suppliers refused to bid on formally advertised fuel solicitations or to respond to requests for proposals for negotiated competitive awards from DOD.

Because suppliers would not respond to DOD solicitations and because of dislocations in the fuels markets, the President started a fuel allocation system which, in part, required suppliers to contract with DOD. Consequently, the Defense Fuel Supply Center, the organization in the Defense Logistics Agency that buys about 99 percent of DOD's fuel requirements, had to negotiate most of its fuel needs noncompetitively. Thus, competitive fuel procurements dropped from 90 percent of the fuel obligations in 1972 to 45 percent in 1978.

Accompanying this drop was a more than three-fold increase in the dollars obligated for fuel. Obligations increased from $1.4 billion in fiscal year 1972 to $4.6 billion in fiscal year 1978. This amounts to an almost 340-percent increase in dollars spent for fuel during a time when total DOD procurement obligations increased only 61 percent. The combination of this loss of competition and dramatically higher priced fuels accounted for approximately 40 percent of the total 8-percent decline in DOD competitive procurements. The Defense Logistics Agency does not expect a significant improvement in competition for fuels soon. Petroleum purchases are expected to continue to comprise a greater percentage of DOD's total procurement budget.

Change from price competitive to noncompetitive procurement of nuclear submarines accounts for 24 percent of the decline

The decline in competition for the procurement of nuclear submarines occurred when the Navy started contracting for the new Trident program. Fiscal year 1972 price competition included modifications and changes to contracts for class 688 submarines initially competed in prior years. At the time, 98.4 percent of nuclear submarine procurement obligations were reported as price competitive. Later, in fiscal year 1978, most of the obligations for nuclear submarines were made for the Trident program and were noncompetitive. In fact, only 6.7 percent of the obligations in this category were price competitive. Like fuels, expenditures for nuclear submarines increased dramatically (about 400 percent) from $305.6 million in fiscal year 1972 to over $1.2 billion in fiscal year 1978. Thus, the noncompetitive Trident program and the dramatic increase in expenditures for this program accounted for $1.138 billion in additional noncompetitive dollars, or almost one-fourth of the total 8-percent decline in competition. The Trident program is expected to continue, and future awards will continue to have a substantial negative impact on DOD's competitive statistics.

CHANGES IN DOD PROCUREMENT POLICIES FOR MAJOR WEAPON SYSTEMS ACCOUNT FOR DECLINE IN PRICE COMPETITION

The early 1970s brought substantial changes in DOD's procurement of major weapon systems. Design and technical competition, where contractors would vie for major contracts through developing the best design or technology to meet DOD requirements, became an important contracting tool. Between fiscal years 1972 and 1978, design and technical competition increased 3 percent--from 7 percent of the fiscal year 1972 budget to 10 percent of the fiscal year 1978 budget. This increase involved procurements which would have previously been price competitive.

An important underlying premise to the increased use of design and technical competition is that a better and more cost-effective weapon system results where emphasis is placed on technical design, thus minimizing pressures to simply contract for the lowest price. Although price is still a significant consideration, such procurements are coded as design and technical competition since the primary emphasis is placed on technical design. DOD's use of design competition influenced the Commission on Government Procurement to recommend its use Government-wide. This type of competition is also currently required by Office of Management and Budget Circular A-109.

The Air Force's fiscal year 1978 statistics, for example, reflect greater use of design and technical competition for fixed wing aircraft. This accounts for 20 percent of the price competitive decline. Changes in this category explain both the decrease in price competition and the resulting increase in design and technical competition. Most of the competition recorded in fiscal year 1972 for the procurement of fixed wing aircraft resulted from modifications to price competitive contracts for the F-14 (Navy) and C-5 (Air Force) aircraft. These contracts were awarded under the total package concept, an acquisition policy used in the late 1960s where major systems were bought with price competitive fixed-price incentive contracts. This concept did not work well, and newer aircraft programs, such as the F-15, F-16, and A-10, were awarded after design or technical competition. Fiscal year 1978 obligations, therefore, were primarily modifications to design and technical competitive contracts. Although these later year contracts were competitive, they were not necessarily price competitive.

MAXIMIZING FORMAL ADVERTISING AND PRICE COMPETITION SOMETIMES TAKES A BACK SEAT TO MEETING OTHER LEGISLATED OBJECTIVES

Obtaining formal advertising and, in general, maximizing price competition are important contracting goals. Other legislated programs, however, often decrease DOD's ability to accomplish these goals. An important example is the Government's set aside program for businesses owned and controlled by socially or economically disadvantaged persons. This program helps meet certain mandated social goals, but it also reduces DOD's ability to obtain unrestricted price competition.

Set asides for businesses owned and controlled by socially or economically disadvantaged persons decrease competition

The Administrator of the Small Business Administration is authorized to help small businesses, owned and controlled by socially or economically disadvantaged persons, achieve a competitive position in the marketplace. Under the set aside program, the agency enters into procurement contracts with other Federal agencies and departments and subcontracts the work to disadvantaged small businesses.

Procurements are generally sole source when set aside for disadvantaged firms. When the Government chooses to place increased emphasis on promoting the viability of disadvantaged firms, it places less emphasis on obtaining competition. Although data was not available for prior years, in 1979, DOD recorded 2,511 contract actions worth $533.7 million to disadvantaged set aside businesses. A DOD contracting official said it is likely that almost all these contracts normally would have been negotiated price competitive or formally advertised.

CHAPTER 4

CONTRACTING PROCEDURES AT THE DEFENSE NUCLEAR AGENCY INHIBIT COMPETITION

Procedures followed at the Defense Nuclear Agency (DNA) made it extremely difficult for contracting officials to exercise their authority to obtain competition. All four noncompetitive DNA contracts we analyzed originated from unsolicited proposals and involved starting work before the contracts were signed (early starts). All could have been awarded under competitive conditions and neither the noncompetitive justifications, nor the technical evaluations, nor the market analyses were adequate. None of the contracts were justified as noncompetitive because of the proprietary nature of their unsolicited proposals. Furthermore, contractors began working on each contract before an actual contract was signed, thus making it difficult for contracting officials to solicit additional contractors. In fiscal year 1979, DNA awarded 781 of its 795 new contracts noncompetitively to "selected sources." The vast majority of these were early starts and awarded from unsolicited proposals. DNA's handling of these contracts violated the intent of DOD guidance on maximizing competition.

UNSOLICITED PROPOSALS SHOULD NOT NECESSARILY LEAD TO NONCOMPETITIVE PROCUREMENTS

Although the contracting officer is responsible for determining whether noncompetitive contracting is justified, DNA's procedures for handling unsolicited proposals fail to fulfill the requirements of the Defense Acquisition Regulation. Any contract intended for sole-source award on the basis of an unsolicited proposal must be accompanied by a justification containing the facts and circumstances that prevent competition and support the recommended noncompetitive action. However, none of the four contracts reviewed at DNA were justified sole source and no documentation demonstrated the uniqueness of the proposals.

Research and development offices, such as DNA, depend heavily on scientists' original ideas submitted in the form of unsolicited proposals for work. An individual's unique creative ideas cannot ethically be competed. Officials at the research and development offices we visited said that such competition would be counterproductive because scientists would then be reluctant to submit proposals.

The Government encourages unsolicited proposals. However, the regulation specifies that unsolicited proposals "should not be merely an advance proposal for a specific agency requirement which would normally be procured by competitive methods." Further, it is necessary for procurement officers to distinguish between unsolicited proposals that are unique and those that are not. Each unsolicited proposal submitted must undergo a comprehensive evaluation, but, according to Defense Acquisition Regulation 4-910(a):

> "A favorable comprehensive evaluation * * * is not, in itself, sufficient justification for negotiating on a noncompetitive basis * * * [If] the substance (i) is available to the Government without restrictions from another source, or (ii) closely resembles that of a pending competitive solicitation, or (iii) is otherwise not sufficiently unique to justify acceptance * * * the unsolicited proposal shall not be acceptable. When procurement is intended and competition is feasible, the proposal shall be returned to the offeror."

When unsolicited proposals are inappropriately awarded sole source--as they were in all four of the contracts reviewed--opportunities for competition are lost. For example, DNA awarded a sole-source contract valued at $49,698 for the compilation and summarization of documents (a literature search) on the effects of electromagnetic pulse on command, control, and communication systems. The need for the service arose out of a change in DNA's Information System Division. After the change, DNA received the proposal to compile and summarize certain technical documents. Although DNA stated the proposal was unsolicited, the contractor could not remember who initiated the idea.

Drawing from DNA's contractor pool, we discussed the contract's requirements with representatives from four other firms, all of whom stated that they would have been interested in reviewing the project. In fact, one firm had already developed a comparable compilation for similar use.

A DNA official stated that it would be presumptuous to assume that no other firm would be interested in the work, but if officials know a firm can do the job it has proposed, they usually award the contract to that firm without checking other sources. This implies that an unsolicited proposal will be accepted if DNA believes the contractor can do the work. DNA does not require that a proposal contain proprietary ideas or that the offeror have unique capabilities. Neither the above contract nor the other three contracts we examined involved unique capabilities or proprietary information.

DNA's process for awarding contracts to selected sources is contrary to provisions in the Defense Acquisition Regulation. More competition could have been obtained. Moreover, no market analyses were done and officials did not question the sole-source justifications. Without market analyses and determinations about the uniqueness of proposals, DNA contracting officers cannot be assured that competition is unavailable or is not feasible.

DNA'S EARLY STARTS POLICY IS ANTICOMPETITIVE

DNA's early starts policy can hamper contracting officials' abilities to require additional competition. An important DNA objective is to start projects quickly. To do this, DNA officials estimate that 80 to 90 percent of their work was begun before formal contract negotiations were completed and before final contracts were signed. Work on all four of the contracts we reviewed was started before negotiations took place. Further, a 1979 Defense Audit Service study found 21 cases where work was started even before the receipt of unsolicited proposals or before the approval of purchase requests. This practice of starting contracts early results from DNA's belief that research and development work needs to be started quickly so there will be no delays in studying new ideas. The Defense Acquisition Regulation permits some discussion between potential offerors and agency personnel. Agency personnel, however, should not commit the Government to accept unsolicited proposals before they are formally submitted. Through the early starts process, some of DNA's contracts violate this limitation.

Early starts render the review process ineffectual. The contracting office is sometimes unaware of the proposed contract until after the technical personnel have been advising the contractor for several months. Thus, there is pressure to fund the project, and any opportunity to question the contract is severely limited.

Some negotiators also find it difficult to negotiate a contract on which work is already in progress. Legally, contractors are working at their own risks until after the contracts are signed. Because of the extra risk, contractors can sometimes demand a higher fee. On one of the contracts examined, the firm received an additional 0.5-percent profit on its original fee as a cost-risk factor for starting early, even though it was the firm, not DNA, who asked to start early.

DNA's review board is similarly constrained. The board is responsible for reviewing individual contracting actions over $500,000, as well as a sample of contracts over $50,000. When work on a contract has been started before the board examines it, it is extremely difficult for the board to require that the work be competed. Therefore, the board primarily has recommended that sole-source justifications be strengthened and that future procurements be competed.

A new DNA instruction, which went into effect on October 1, 1980, states that all early starts must be approved by the General Counsel, the Deputy Director for Science and Technology, and the Deputy Director for Operations and Administration. According to the instruction, a new early starts justification must be provided to show the benefit to the Government of an early start and "explain overall impact on cost, schedule, and performance if this action is not taken." However, during the first 20 days that the new policy was in effect, about 100 early starts were approved. Contracting through the early starts procedure should not be a normal contracting practice. Whether DNA's new policy will halt unnecessary early starts is unclear. One thing is clear: DNA's procedures for handling unsolicited proposals and its practice of starting work before negotiations inhibit competition and increase the cost to the Government.

CHAPTER 5

CONCLUSIONS, RECOMMENDATIONS, AND AGENCY COMMENTS AND OUR EVALUATION

CONCLUSIONS

The Defense Acquisition Regulation requires contracting officers to offer as many qualified contractors as practicable the opportunity to compete for Government business. Ideally, awards through formal advertising and negotiated price competition provide the maximum assurance that the Government receives acceptable goods and services at the lowest price.

Historically, maximizing price competition has proved difficult. In fiscal year 1978, price competitive procurements (including formally advertised and small business set asides) represented only 26 percent of DOD's procurement budget. This is down 8 percent from fiscal year 1972, when price competitive procurements accounted for 34 percent of DOD procurements. About two-thirds of this decline are attributable to petroleum procurements and the Trident submarine program.

Increased competitive contracting is possible. On the basis of our statistical sample, we found that about $289 million in noncompetitive procurements could have been competitive. Each of these contracts was valued at less than $1 million. Most of the inappropriate procurements occurred because contracting officials accepted headquarters commands, technical, and end-user requests for noncompetitive purchases without adequate support that only one source was available.

Contracting officials did not develop factual support needed to assure the validity of the rationale for not formally advertising or for awarding a contract noncompetitively.

Major processing deficiencies included

--not factually demonstrating that there was insufficient time to formally advertise,

--not performing market research,

--failing to obtain or develop data needed to solicit other contractors, and

--establishing procurement specifications which did not represent the Government's minimum needs and reduced or eliminated competition.

Correcting the contracting problems we identified could increase competitive procurements. However, price competitive contract awards as a percentage of DOD's procurement budget may continue to decline since most of the loss in competitive dollars after fiscal year 1972 resulted from dramatically high obligations and loss in competition for needed military fuels, the noncompetitive procurement of Trident submarines, and the shift to design and technical competition for fixed wing aircraft.

DOD recently required the services and the Defense Logistics Agency to develop plans to improve their competitive performances. Except for the Defense Logistics Agency's plans, however, none of the plans specifically address the contracting problems identified in this report.

The Defense Nuclear Agency needs to improve the way it buys and contracts for research and development projects. Specifically, using unsolicited proposals to selected sources and starting contract work before negotiations should be limited to those cases where there would be demonstrated harm done to the Government by going through proper contracting processes.

RECOMMENDATIONS

We recommend that the Secretary of Defense give more emphasis to increasing competitive procurements by:

--Providing to contracting officers and program personnel more specific guidance on the factual support needed to justify a noncompetitive procurement. (See app. II for our proposed DOD guidance needed for the services.)

--Requiring that the services (1) address the specific contracting problems identified in this report in their plans for improving competition and (2) establish percentage improvement goals.

--Establishing a systematic approach for monitoring procurement office goals and reviewing selected contracts and documentation to assure they were appropriately awarded.

This latter approach will provide DOD officials with a management tool for improving competition in defense procurements. In its simplest form, it is a systematic analysis of competition in each procurement office by type of procurement. The analysis should compare the current extent of competition obtained by each procurement office for each item it procures with past years' level of competition in that office. It also should provide data comparing current levels of competition at each purchasing office with a current level of competition for the whole of DOD. The information needed for the analysis is available through DOD's procurement action reporting system and could be readily analyzed with computer assistance.

The analysis would be accomplished through three steps. Step one would determine the current year's actual level of competition, step two would show how well the procurement office would have done if during the current year it obtained as much competition as it had in the past, and step three would show how well the procurement office would have done if it had obtained as much competition as DOD as a whole. The analysis should emphasize the percentage increase in dollars rather than in numbers of contracts.

By comparing expected competition with actual competition, one can identify and review differences. Then, on the basis of competitive goals for each office, each service and the Office of the Secretary of Defense would have a basis for systematically reviewing individual procurement office performance.

In addition, we recommend that the Secretary of Defense require the Defense Nuclear Agency to take steps to reduce its use of early starts and unsolicited proposals as a way of contracting.

AGENCY COMMENTS AND OUR EVALUATION

DOD agreed with the thrust of our recommendations concerning the need to justify noncompetitive procurements and the need for DNA to strengthen its contracting procedures. However, DOD did not believe that contracting officers and program personnel should have more specific guidance on the factual support needed to justify noncompetitive procurements. It stated that adequate guidance was currently available in the Defense Acquisition Regulation and in service regulations.

We disagree with this position. Our findings clearly demonstrated that DOD procedures were, in fact, inadequate and did not ensure that contracting officers obtained competition whenever feasible. The Defense Acquisition Regulation does not specifically indicate what information is required to justify noncompetitive procurements. Several DOD organizations have recognized this deficiency and have developed their own internal guidance. We strongly believe that DOD-wide guidance is urgently needed to reduce the number of inappropriate noncompetitive awards.

DOD further stated that establishing and monitoring percentage goals for improving competition was impractical because too many variables affect competitive performance. Although DOD suggested that motivating contracting officers and their superiors to foster competition was a better approach, it did not specify the nature of this motivation. On the basis of our review findings, we see little hope that DOD will correct the problems identified in our report unless DOD management translates its stated desire to obtain competition into realistic goals.

EXECUTIVE OFFICE OF THE PRESIDENT OF THE UNITED STATES
OFFICE OF MANAGEMENT AND BUDGET

Proposal for a Uniform Federal Procurement System

February 26, 1982

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

February 26, 1982

TO THE PRESIDENT OF THE SENATE AND THE
SPEAKER OF THE HOUSE OF REPRESENTATIVES

In accordance with Public Law 96-83, "The Office of Federal Procurement Policy Act Amendments of 1979," and on behalf of this Administration, I respectfully submit an integrated proposal for the Uniform Federal Procurement System, as developed by the Office of Federal Procurement Policy. The proposal describes desirable reforms in Federal procurement and management systems as well as the substance of changes in legislation to accomplish these reforms.

It has long been recognized that major reforms in Federal procurement practices are needed, not only to minimize adverse impacts upon the private enterprise system, but also to improve the economy and efficiency of Government operations. The recognition has progressed through the Commission on Government Procurement (1969 - 1972), the establishment of the Office of Federal Procurement Policy (1974), the OFPP Reauthorization Act requirements (1979), and has culminated in the enclosed proposal.

This proposal represents the Administration's commitment on the need for, and the nature of, procurement reform. In furtherance of that commitment, we anticipate that a Presidential Executive order will be issued within the next few days on the subject of procurement reform. It will assure that the reforms that can be accomplished by administrative actions are made in an orderly, effective, and timely manner. This Executive order is but one in a series of actions this Administration is taking to improve the process by which over one-fifth of the Federal Budget is spent.

You will note that Chapter 5 of the proposal contains the substance of possible amendments to the Armed Services Procurement Act, the Federal Property and Administrative Services Act and to other statutes. These draft revisions contain the essence of changes believed desirable to fully achieve all the management system and procurement system improvements anticipated for the proposed system. Further work and interagency coordination are needed to finalize these and convert them into bill format. Where appropriate, tests should be conducted in those areas where the possible amendments result in what appear to be fundamental changes to long established acquisition processes, such as the new concepts and methods of competition. Legislative authority to conduct such tests will be sought where necessary. We anticipate forwarding an executive branch bill by April 30, 1982. In the meantime, the Executive order, once issued, will permit proceeding immediately with those changes not dependent upon statutory revisions.

The Administrator for Federal Procurement Policy stands ready to work with the Congress in the implementation of the Uniform Federal Procurement System.

Sincerely,

Edwin L. Harper
Deputy Director

Enclosure

NOTE: The Executive Order, referenced above, was signed by President Reagan on March 17, 1982, and is included as Appendix F to this Proposal.

Section 4. Effective Competition With Latitude for Innovation

Current Concepts of Competition Are Deficient

To overcome longstanding problems in achieving effective competition in Federal procurement, the proposed system introduces new statutory concepts of competition, together with new methods to stimulate and expand the use of competition. These new concepts and methods give first priority to what is in the marketplace rather than what ought to be in the marketplace. They are intended to stimulate wider use of competition by stressing substance, not form. The system also establishes focal points to advocate and help plan for competition. It statutorily restricts noncompetitive procurement to very special circumstances.

The national policy on competition has been a part of various procurement statutes almost since the nation was founded. Congressional emphasis on full and free competition is manifested in statutory preferences for formal advertising, dating back to 1809. Yet, as figure 13 shows, formal advertising accounts for less than eight percent of the FY 81 Federal procurement dollars, and more than half of the total dollars were reported as noncompetitive.[16] Figures 14 and 15 show the degree of competition in 1981 reported by the major agencies for large and small purchases.

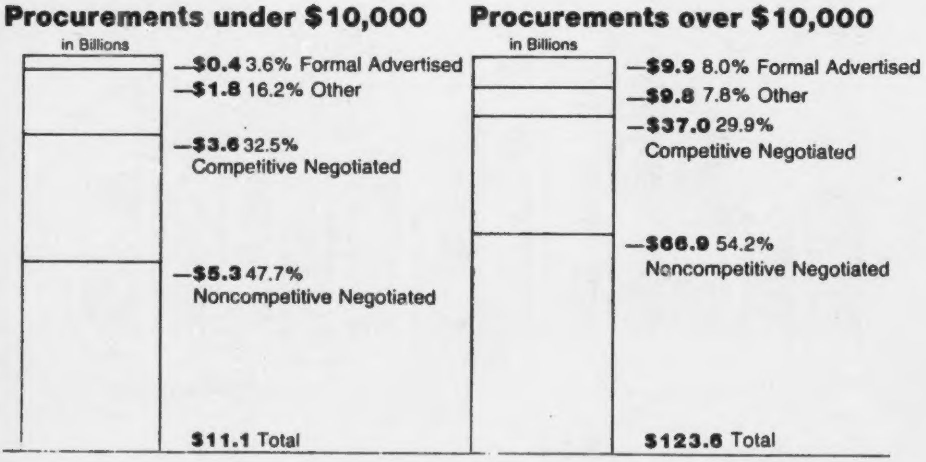
Why the Competitive System Needs Changing

The preferred method of competition now required by statute is so rigid that it actually inhibits the Government from taking advantage of the competitive marketplace. Formal advertising requires precise specifications, terms and conditions—a common baseline that permits award solely on the basis of price. The result is that the base of suppliers tends to shrink to those few (or in some cases only one) who perform to unique Government specifica-

Fig. 13

Methods of Procurement

Fiscal Year 1981



Procurements under $10,000

Procurements over $10,000

Source FPDS

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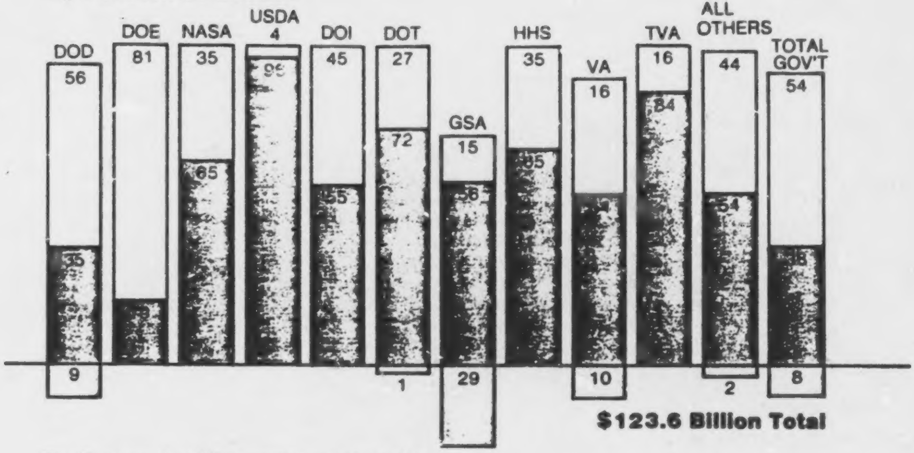
[16] Some portion of the percent of noncompetitive dollars went for follow-on contracts. Reliable data are not available to show how many of the original contracts were competitive.

Fig. 14

Degree of Competition in Procurements over $10,000

Fiscal Year 1981

By Percent of Dollars



By Percent of Procurement Actions

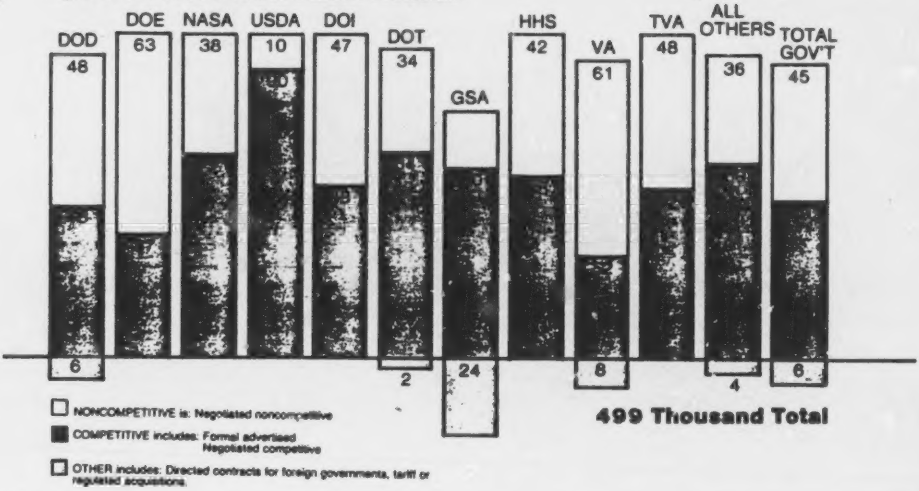
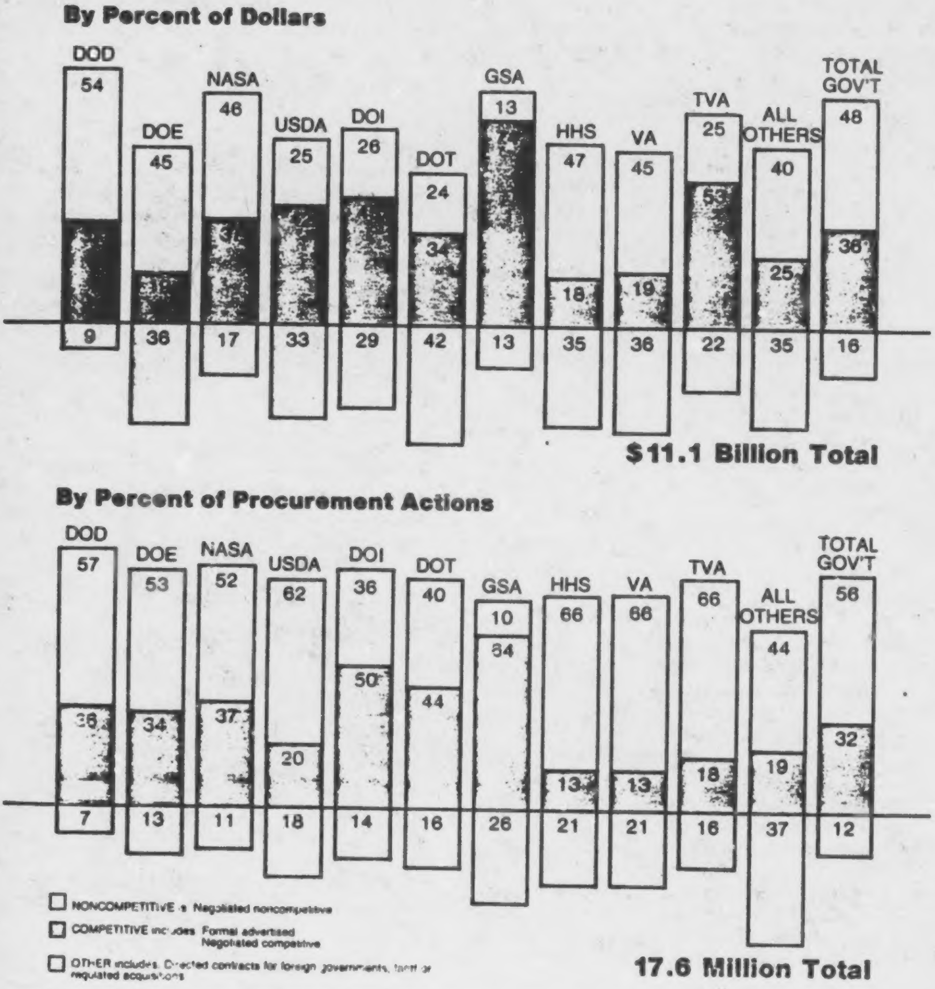


Fig.15

Degree of Competition in Procurements under $10,000

Fiscal Year 1981



By Percent of Dollars

$11.1 Billion Total

By Percent of Procurement Actions

17.6 Million Total

tions. The Government often becomes the sole or major customer for these contractors. Sometimes, formally advertised solicitations attract only one bidder. Each side is sheltered from the competitive forces of the marketplace; each is a captive of the other.

Government Mandated Designs Curb Competition

Over 46,000 Government specifications and standards have been developed. Some of these are necessary, particularly for items unique to military operations. In many cases, however, the use of detailed design specifications precludes consideration of acceptable alternatives. A wide range of similar but not identical products which have stood the test of the commercial marketplace and which may perform better and cost less to own is not considered. This deprives the Government of much private sector ingenuity, new technology and expertise. Because survival in our private enterprise economy requires that products be designed to compete not only on price but also on performance, operating costs, ease of maintenance and durability, the lowest bid on a solicitation could be the highest cost.

Use of unique Government specifications has several other disadvantages. They:

- Often take years to prepare, may run into thousands of pages, are too complex for many firms and are expensive to maintain and update.
- Cannot keep pace with continuous advances in the commercial marketplace and are constantly threatened by obsolescence.
- Require special facilities, production lines and startup costs which few firms are willing to accept—because they wish to stay competitive in the commercial marketplace.
- Tend to perpetuate old technologies, retain inefficient capital equipment and foster outdated industry practices.
- Frequently depend on transfer of technical data and drawings from the original producer to other firms. Such transfers are often incomplete due to trade secrets, individual shop practices, process techniques, constant design changes and lack of contractor motivation.
- Constantly leave the Government open to charges of errors in specifications and drawings, thereby permitting contractors to escape performance responsibility.
- Lead to goldplating by the Government as extra protection against inferior quality from marginal firms.
- Level competitors technically and lead to "buy-in" pricing because it is the only way left for a firm to distinguish its bid. The Government usually pays the real cost either in pricing follow-on work or through a "bailout."

Finally, formal advertising is predicated on the assumption that specifications can be drafted so perfectly by the Government that all bidders will be bidding on the same thing, and that price, without discussion, will be the only basis for award. This method is often not suitable for meeting agency needs; nor, as discussed above, is it the best way in many procurements to maximize competition. In fact, formal advertising cannot be used at all for procurements of complex or new and unproven products or services which represent more than half of today's Federal procurement dollars.

What Is the Contracting Officer's Alternative Today?

If, under present statutes, contracting officers need to explore alternative products or designs, consider factors other than initial price or have discussions with prospective contractors, they must select, justify and document a statutory exception to formal advertising. The exceptions to formal advertising are numerous and all-encompassing (17 for Defense and 15 for civil agencies). Over 90 percent of Federal procurement dollars are spent through statutory exceptions (figure 13).

A significant portion of negotiated procurement is competitive. However, the public perception of negotiation is that it is noncompetitive. The following statement illustrates the frustration of the largest single Federal procuring agency in attempting to operate under the current statutory concept of competition:

> . . . The complexity of most military products is such that formal advertisement procedures simply cannot be made to work in the vast majority of cases . . . It is the substance, rather than the form, of competition which should be of principal concern to the Congress and the public.[17]

A New Statutory Approach to Competition

The problems with competition can be overcome by replacing the present requirement (either to use formal advertising or justify negotiation) with the business policies and practices described in this proposal.

The proposal recognizes that a basic element of our free enterprise system is that participation in any market, including the Government market, is voluntary. Therefore, the Government is competing for industrial resources. To obtain competent contractors, the Government must offer satisfactory rewards and an environment in which private sector managers are willing to compete. In short, the Government must attract its industrial base; it cannot command it, except in wartime.

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[17] Honorable Clark M. Clifford, Secretary of Defense, Fiscal Year 1970 Posture Statement, p. 146.

What Is Effective Competition?

From the standpoint of Government procurement, competition is a marketplace condition in which two or more independent firms, each with a reasonable expectation of winning, can bid to obtain a contract.

To be effective, competition must enable the Government to acquire products or services at reasonable prices, and it must be efficiently and fairly conducted. Since conditions vary from one procurement to another, contracting officers must have the flexibility to capitalize on how best to achieve effective competition in a given case.

New Standards for Competition

Perhaps the greatest impetus to competition in the proposed system will be the simplification of the procurement process discussed earlier. This simplification will be reinforced by statutory requirements for effective competition, stringent limitations on noncompetitive procurement and by Government-wide quantitative and qualitative standards in areas such as the following:

- Advance Planning. There will be advance planning of proposed procurements above a certain dollar threshold, together with analysis of the marketplace to determine what is available to satisfy agency needs.[18]
- Statements of Need. The solicitation will incorporate a clear and accurate performance description of the need or requirement to be satisfied. It will not contain features, designs or manufacturing processes which unduly restrict competition. Functionally stated performance requirements will be used to the maximum extent possible.[19]
- Proprietary Items. The existence of patents or other proprietary rights will not be the basis for noncompetitive procurement if there are competitive alternatives.
- Contractor Qualifications. Unreasonable qualification or experience requirements will not be used to limit sources, nor will bonding requirements be used as a substitute for determining responsibility. Contracts will only be awarded to bidders who are financially capable and have the ability to deliver the desired product or service.
- Public Notice. Proposed procurements above $10,000 will normally be announced in the Commerce Business Daily in enough detail and sufficiently in advance of the date for receipt of bids to permit interested prospective sources to submit bids. Similarly, contract awards over $25,000 will also normally be announced in the Commerce Business Daily.
- Number of Bid Sets Available. Bids will be solicited from lists of prospective sources. Rotation of source lists may be used when lists of potential sources are unreasonably long, provided that a sufficient number are solicited to ensure effective competition and that bid sets are available upon request.
- Impartiality. There will not be bias or favoritism in the solicitation for bids, evaluation and contract award.
- Auctioning. Unjustified price reductions will not be sought through repetitive requests for "best and final" bids. If adequate price competition exists, the Government will normally not ask for a price reduction from prospective contractors unless there is a material reduction in scope of work or change in terms and conditions.

Methods of Solicitation

Procurement under the proposed system will be either competitive or noncompetitive, with an absolute preference for competition. Two equally valid methods of solicitation will be used to obtain competition. They equate generally to the solicitation procedures for formal advertising and competitive negotiation. The following terms were selected to depict these methods because they are more descriptive and more easily understood by those not familiar with Government procurement:

- Bidding without discussion will be used when the Government's requirements and the terms and conditions of the solicitation can be sufficiently described to allow the timely preparation and evaluation of bids on a common basis without the need to hold discussions with bidders. A public bid opening will be held and award made to the low responsive and responsible bidder.
- Bidding with discussion will be used when it is necessary to discuss the requirement or terms and conditions after receipt of bids but prior to contract award. The bid opening will not be public. Award will be based on the evaluation factors set forth in the solicitation.

Additional innovative solicitation methods that are a combination of the above (e.g., two-step) may also be used.

New Statutory Types of Competition[20]

The proposed system contains three equally valid types

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18) In the acquisition of major systems, sophisticated advance planning is used to prioritize needs, explore alternatives and reduce risk.

19) There are many items that must be manufactured according to detailed specifications. The main idea is not to limit competition to those who are willing to manufacture to a special design, nor to prevent the Government from taking advantage of a range of products, services and ideas that the marketplace might offer.

20) Architect-Engineering services which are related to construction are procured under special legislation and are not included in this proposal.

of competition based on the nature of the need and what is available in the marketplace. These are:

- Price. Competition based on the price to the Government.
- Lowest Total Cost. Competition based on total cost to the Government, including such considerations as purchase price, and maintenance and operating costs over the useful life of the product or service.
- Multiple Factors. Competition based on price or cost and such other factors as design, performance capability, service, delivery, and technical and management ability.

Using the Proposed Types of Competition

Figure 16 depicts the criteria for each type of competition, figure 17 shows their application to the procurement process, and figure 18 shows the highlights of the proposed types of competition and methods of solicitation.

Price competition will be used when analysis of the marketplace shows equal or similar products or services available that will satisfy the agency's needs and the basis of evaluation will be price and price-related factors only (transportation costs, discounts, etc.). Award of a firm-fixed-price contract will be made to the lowest responsible bidder meeting the solicitation conditions. Price competition and award without discussion equate to formal advertising under the current system.

Lowest total cost will be used when competing products or services are anticipated to be so dissimilar as to significantly affect performance and ownership costs. There are many instances (such as in the automotive, aircraft and electronic fields) where the best value can be obtained through total cost competitions. This permits consideration of such factors as product performance, operating and maintenance costs, energy consumption, product life, reliability and safety. Thus, a particular product may be preferable, even though the initial price is higher.

In this type of competition, the agency's need is reasonably firm and the analysis decides which solution offers the lowest total cost to the Government. The kinds of competing candidates for total cost competitions are those where the products or services have been completely developed and the unit cost is predictable, but the cost of ownership may or may not be predictable. The degree of analysis required varies with the dollar value of the procurement. If the value of the procurement does not warrant consideration of ownership costs, award will be made on the basis of price. In evaluating which alternative is the best value, the contracting officer will normally be assisted by such specialists as logistics, engineering, quality and cost experts.

Fig. 16

Criteria for New Types of Competition

Types of Competition

Criteria	Price	Lowest Total Cost [1]	Multiple Factors [1]
Commercial products/services are available:			
● Which are sufficiently similar to decide on price.	▨		
● Which are so dissimilar as to affect performance or cost of ownership.		▨	▨
Previously defined products/services for agency peculiar needs are available:			
● Which are sufficiently similar to decide on price.	▨		
● Which are so dissimilar as to affect performance or cost of ownership.		▨	▨
No defined solution available or technical and/or management ability are critical			▨

[1] The difference between lowest total cost and multiple factors competition is that for lowest total cost, required performance is relatively fixed and the analysis centers on comparing total cost of dissimilar solutions; under multiple factors, tradeoffs are permitted between performance and cost—a more comprehensive analysis.

Fig. 17

Applying Competition To the Procurement Process

Procurement Process	**Types of Competition**		
	Price	Lowest Total Cost	Multiple Factors
Method of solicitation	Bidding with or without discussion [1]	Bidding with or without discussion [2]	Bidding with discussion
Evaluation factors	Price	Lowest total cost	Technical, price, lowest total cost or other factors
Contract type	Firm-fixed-price	Fixed-price type	Full range of fixed-price to cost types based on risk

1) Awards on the basis of price will, in almost all cases, be made without discussion after a public bid opening. In such cases, no discussions will be permitted after the opening. However, there may be instances where the Government's knowledge of the market is not adequate to allow it to commit itself unequivocally to accept the lowest bid or to foreclose the possibility of discussions with bidders before awarding a contract. In these cases, the solicitation will clearly indicate that the Government reserves the right to discuss prices, and the bid opening will not be public.

2) Awards on the basis of lowest total cost generally require discussion with one or more bidders. However the solicitation can reserve the right to make award without discussions. In those instances where it is known prior to solicitation that the factors which determine lowest total cost can be evaluated and a decision made without discussions, the solicitation should so indicate, and the bid opening should be public. In such cases, no discussions will be permitted after bid opening.

If variations in quality and ownership costs can be objectively quantified in advance, bids without discussion will be used. (This equates to formal advertising.) If they cannot, bids with discussions will be used and subjective business judgments permitted. Award of a fixed-price contract will be made to the bidder who offers the lowest total cost product or service.

Multiple factors competiton is all-inclusive. It is more complex than price or lowest total cost competition and can involve evaluation of new ideas, productivity improvements, new products and cost factors, as well as a firm's technical and management ability. It will be used when any of the following conditions apply:

- Government needs cannot be precisely described.
- There is no well-defined solution to Government needs.
- Evaluation factors for award cannot be objectively measured.
- Technical or management performance is critical.

Under these circumstances, the basis of competition is in ideas, designs and technology rather than short-range price advantage. Examples are research and development, new products and military systems or complex services. In this type of competition, the agency may still be considering what its performance should be, and trade-offs may be made between performance and cost. Discussions may be conducted with one or more of the bidders when it is in the best interest of the Government. These discussions may range from clarification of bids to substantive technical, management or cost factors.

Procedures for multiple factors competition will be tailored to the dollar value, complexity and risk of the procurement. Expedited procedures may be used for low dollar procurements, or competition may be sustained into hardware demonstration phases for high dollar pro-

Fig. 18

Competition Highlights

Drops preference for formal advertising; allows flexibility within statutory criteria to choose procurement method most suited to agency need and marketplace.

Opens up competition and permits contractor performance responsibility by shifting away from Government mandated designs.

Sheds complex rules, unnecessary paperwork and regulations.

Removes useless controls on negotiation—the statutory exceptions (15 or 17) and all their attendant paperwork.

Expands competition by limiting the use of noncompetitive procurements to seven conditions.

Separates competitive from noncompetitive and recognizes that competition takes more than one form.

Works from a new definition of competition that encourages ideas, use of new technology and product competitions.

Allows patented items to be competitive if there are alternatives.

Gives statutory recognition to innovative combinations of competitive methods of procurement.

curements. The type of contract agreed upon can range from fixed-price to cost reimbursement, depending on the risks involved.

Application of Multiple Factors Competition to Major Systems

One of the most important uses of multiple factors competition is to bring new system concepts from promise to performance. This type of competition has special significance in the early procurement phase of new major systems because:

- Competition in any form may not be feasible or economical once production of the new system begins.
- Parallel exploration of different technological approaches can be continued until a confident choice can be made for large production investments.
- Effort is focused on those key decisions that drive the agency's ultimate system investment cost, mission performance and the often enormous resources later needed to carry out the agency's mission. These key decisions include the:
  - Kind of system and operational approach to be used.
  - Particular technologies to be employed.
  - Main design features and key subsystems.

DOD's experience in the 1970's shows the following advantages of extending early competition to performance demonstration:[21]

- Better contractor designs.
- Cost overruns reduced by an average of one-third.
- Programs speeded up.
- Reduced risk of choosing the wrong design.

Special Category for Follow-On to Competition

In developing new major systems, it is sometimes necessary to invest millions of dollars in a sustained hardware design and demonstration competition before award of an initial production quantity. In such cases, the time and effort invested by the winning contractor, including investment in tooling, test equipment and plant modernization, precludes competing follow-on quantities. Procurements in this category will be identified and reported as "follow-on to competition." In other cases, where continued competition into production is feasible because of long and stable production rates and low facilities investment, follow-ons will not qualify for this special category. In any case, continued competition at the subsystem and supplier levels will be emphasized.

Controlling Noncompetitive Procurements

Although competition will always be preferred, some noncompetitive procurements are inevitable. A degree of latitude will, therefore, be permitted for specific circumstances when competition is not feasible. Noncompetitive procurement above a certain dollar threshold will normally require approval within the agency at a level higher than the contracting officer and a determination that the action is in the best interest of the Government. Also, there will be advocates for competition in the agencies to provide some check and balance on noncompetitive procurements.

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[21] Acquisition Policy Effectiveness: Department of Defense Experience in the 1970's, a report prepared for the Under Secretary of Defense for Research and Engineering, Rand Corporation, October 1979.

Conditions for Noncompetitive Procurements

Circumstances under which a noncompetitive contract may be awarded will be statutorily limited to the following:

- When the product or service is available from a single source, and no competitive alternatives are available in the marketplace.
- When a serious emergency will not permit the delay inherent in obtaining competitive bidding.
- When an award must be directed to a particular source in order to create or maintain an essential industrial capability, for purposes of industrial mobilization, or because it is impracticable or uneconomical to obtain competition for follow-on procurements.
- When a procurement source is required by international agreement or directed by a foreign government.
- When required by statute to be obtained from or through another Federal agency or a specific source.
- When disclosure to more than one bidder would jeopardize the national security.
- When it is determined by the head of the agency that it is impracticable to obtain competition.

The method of solicitation will be bidding with discussion and the basis for award will be price, lowest total cost or multiple factors.

Strengthening Management Control

To further limit noncompetitive actions, as well as to encourage more substantive competition, the proposed system provides that agency Procurement Executives will devote greater efforts to expanding competition. The greatest effort should be devoted to the early part of the procurement cycle to see that opportunities for competition are not lost or foreclosed by poor planning, uncoordinated agency decisions or failure to analyze the marketplace to ascertain what is available.

The GAO recently sampled Defense and civil agency noncompetitive procurements. Both studies show that competitive opportunities were missed in one-fourth or one-third of the cases sampled, depending on the particular agency. Reasons for missed competitive opportunities included:

- The contracting officer accepted recommendations of technical personnel on the assumption that they were aware of what was available in the marketplace.
- The contracting officer accepted end-user requests for particular items based on user comments about contractor capabilities and availability of competition.
- The contracting officer accepted requests for particular items from highranking officials.[22]

Other recent GAO studies show that although some degree of competition was reported in particular procurements, the solicitation restricted who could bid, or what product design could be offered, or how the product itself could be manufactured or contained a combination of such restrictions. In one case, involving production of U.S. Savings Bonds, for example, removal of the restrictions opened the competition to companies having more advanced technology and automated equipment. The result was a $1.3 million annual reduction in a $3 million contract plus a better quality product.[23]

There is no assigned or generally recognized organizational responsibility for ensuring that competition is either sought or achieved. The procurement organization looks to the agency's technical personnel or "customer" to analyze the marketplace and to make its requirements known in a timely manner, while the technical personnel look to the procurement organization to draft an adequate solicitation and obtain competition within the confines of the specified schedule. Unfortunately, there may be little motivation or initiative to seek competition because there is no assigned responsibility or accountability for obtaining competition.

Advocates for Competition

The proposed system calls for a competition advocate. In some cases, Procurement Executives may assume this role. In other cases, conditions at major procuring centers may require a full-time advocate.

The advocate will focus on the early part of the procurement cycle when need statements are drafted and funds are requested. At this stage, the advocate will see that opportunities for competition are not foreclosed by restrictive need statements, underfunding, unnecessarily detailed specifications, poor planning or arbitrary agency action. In addition, the advocate will ensure that:

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[22] These are Defense study results in GAO Report PLRD-81-45 of July 29, 1981. We understand the civilian study results, showing that even greater competitive opportunities are being missed by civil agencies, will be published in a few months.

[23] See GAO study (GGD-80-32, Sept. 25, 1980) on the Department of Treasury procurements of U.S. Savings Bonds.

- Program managers participate in introducing competition.
- Factors or problems that inhibit competition, especially as they affect small business, are surfaced and addressed, and corrective action taken.
- Reasonable competitive alternatives to a proposed noncompetitive award have been considered.
- Reliable data are being reported to top management about the extent of competition actually obtained in procurement actions.
- Experience data and new techniques to obtain competition are exchanged with other purchasing activities.

Ensuring Reasonableness of Prices

The proposed procurement system will include two features to ensure reasonableness of prices in noncompetitive or follow-on to competition procurements.

- First, in any follow-on to competition contract, the chosen solution and its cost, in most cases, will have been derived from an earlier competition that was sustained into hardware demonstration. Therefore, there will be a baseline for pricing follow-on procurements that cannot be subjected to further competition, as in the case of major systems requiring large initial investments and many years to develop.

- Second, the current Defense and NASA Truth-in-Negotiations Act will be expanded Government-wide and focused on noncompetitive procurements above a certain threshold. There will be precontract reviews of contractor cost proposals, as well as selective postcontract audits to see if any defective pricing occurred. If so, the proposed legislation will enable the Government to recover any amounts by which prices are overstated.

Fig.20

Range for Estimated Savings Resulting from Improved Competition

In Billions	Minimum	Maximum
Noncompetitive Federal procurement (FY-81) (Source: FPDS)	$72	$72
Rate for converting noncompetitive to competitive procurement	20%	30%
Amount of new competitive procurement	$14.4	$21.6
Percent of savings	7%	25%
Savings from new competitive procurement	$1.01	$5.40

Estimates by Recognized Authorities

The estimated cost savings and benefits developed through the quantitative estimating technique are consistent with estimates made by recognized authorities. For example, a former DOD official in a recent study of the defense industry estimated that savings of $5 billion could be achieved in DOD production procurement.[26] (If this were extended to total Federal procurement, it would amount to more than $7 billion.) During hearings on the draft proposal, members of the Senate forecasted savings in the range of $5-11 billion and $5-20 billion.[27]

In addition, the conclusions of OFPP with respect to potential benefits from improvements in Federal procurement are supported by those of the Commission on Government Procurement.[28] Faced with the same difficulties experienced by OFPP in putting a dollar estimate on its recommendations, the Commission said that although this could not be done with any degree of precision, it was certain that substantial savings could be made.

By using the quantitative estimating technique, OFPP was able to express the potential savings in dollar terms with as much precision as is possible, given the limitations on available data. Like the Commission, OFPP recognizes the difficulties in making dollar estimates of savings from implementation of its proposal but is confident that savings would be at the high end of the range shown in the quantitative estimate. This is supported by estimates from recognized authorities. Finally, it is reasonable to assume that, with the addition of the proposed statutory changes, the total system savings will be appreciably higher.

Intangible Benefits of the Proposed System

There are two major intangible benefits—increased public confidence in Government and improved Government-contractor relationships—that complement the tangible benefits. In addition, figure 21 provides a more detailed overview of the present system, proposed changes and their implications in nonquantitative terms.

Increased Public Confidence in Government

Federal procurement has been accused by the public, Congress, State and local governments and those within the Federal Government itself of being too complex and generally overburdened with regulations and paperwork. Adding to these complaints are long delays in obtaining Government decisions and instances of waste and abuse.

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26) Gansler, Jacques S., *The Defense Industry*, The MIT Press, Cambridge, Massachusetts, 1980, pp. 220-224.

27) See hearings on Office of Federal Procurement Policy's Draft Proposal for a Uniform Procurement System, before the Subcommittee on Federal Expenditures, Research, and Rules, of the Committee on Governmental Affairs, U.S. Senate, December 10, 1981.

28) Report of the Commission on Government Procurement, Volume 1, December 1972, U.S. Government Printing Office, p. 7.

REPORT OF THE DEFENSE SCIENCE BOARD
1979 SUMMER STUDY
ON
REDUCING THE UNIT COST OF EQUIPMENT

MARCH 1980

OFFICE OF THE UNDER SECRETARY OF DEFENSE FOR RESEARCH AND ENGINEERING
WASHINGTON, D.C.

INTRODUCTION

The Summer Study Task Force of the Defense Science Board on Reducing Unit Cost of Equipment approached its assignment with full recognition that the subject of cost reduction in defense programs has hardly been ignored. Some members of the Task Force have participated in previous studies that directly or indirectly addressed this issue. Thus, a portion of the material contained in this report will be familiar, since it has been developed before in previous Defense Science Board studies. The problem of high unit costs, however, still exists and becomes more acute each day. New thoughts are presented but some previous recommendations have been repeated in the hope that the total will be more useful. The Task Force made a conscious effort not to write a management manual but to provide actionable recommendations.

The DOD faces a major unit cost problem generated in large part by the philosophy that increased performance can offset a quantitative disadvantage. The United States, through administrative and congressional actions, has accepted this numerical disadvantage by its successive compromises during the budgeting process. The Task Force did not address the performance vs. quantity issue directly but certain of the recommendations suggest that requirements for performance may frequently be overstated in an effort to compensate for lack of quantitative equality.

The Task Force also did not specifically address Life Cycle Costs, but it was clearly an implicit constraint in developing recommendations and initiatives

Requirements frequently appear to be driven by available technology rather than real need. It was the opinion of most members of the Task Force that if something technologically can be done, and this offers greater performance and flexibility, it will often be included in a requirement, without an evaluation of the real costs and worth of the achievement. The procurement and requirements process also appears to be driven by imputing a similar technology to potential adversaries, thus driving the United States to seek higher and higher performance with resultant greater expenditures.

The cost problem appears also to be exacerbated by Service competition for a rational share of the budget based on individual service views of responsibility for its future effectiveness in performing its mission. This places emphasis on the near term, with np reward for conservative estimates of future costs. If a program can get started long development times assure that ultimate inventory levels and production rates are not as subject to early fiscal constraints as would be a total Five-Year Program projection containing all the desired programs. Since the budget for procurement is relatively fixed, it is spread over all projects instead of a selected few. Thus, fewer units than planned are procured. This results in changes in plans. Changes in plans cost money. With less money there will be fewer units. Thus the Services enter a self-defeating spiral of increasing costs, and fewer end articles.

The Task Force attempted to address not only the real problems of reducing unit costs but also the problem of a long developing environment that makes simple rational solutions difficult to introduce.

CHART 13

COMPETITION - RATIONALE

- COMPETITION IS A POWERFUL MOTIVATOR FOR COST CONTROL
- STUDIES SHOW PRODUCTION COMPETITION CAN REDUCE UNIT COST
  - ELECTRONICS X (1973)
  - IDA STUDY (1979)
  - RAYTHEON STUDY (1979)
  - HUGHES STUDY (TOW)
- SOME PRODUCTION COMPETITION TECHNIQUES HAVE BEEN DEMONSTRATED
  - WINNER TAKE ALL
  - LEADER/FOLLOWER
  - SPLIT BUY
- FULL SCALE DEVELOPMENT COMPETITION
  - SUBSTANTIALLY INCREASES DEVELOPMENT COST WITH INDETERMINATE PAYBACK
  - MAY BE JUSTIFIED IF DEVELOPMENT COST IS SMALL PERCENT OF TOTAL PRODUCTION COST
  - SOLE SOURCE DEVELOPMENTS NEED NOT CLOSE OFF PRODUCTION COMPETITION

CHART 14

COMPETITION LIMITATIONS

RECOGNIZE THE LIMITS TO COMPETITION

- PRODUCT HAS BEEN PROVEN, FULLY DEFINED, AND HAS REASONABLE PRODUCTION QUANTITY
- COMPETITION IS NO SUBSTITUTE FOR EARLY FUNDING FOR THE PROGRAM
- FRONT END INVESTMENT ESSENTIAL FOR COMPETITION AND TAKES TIME TO RECOUP
- MORE TIME MAY BE NEEDED TO QUALIFY, EVALUATE, AND BRING COMPETITORS UP TO SPEED
- COMPETITORS MUST BE QUALIFIED OR TRAINED

CHART 15

USE OF COMPETITON - RECOMMENDATIONS

- SELECTIVELY INCREASE USE OF COMPETITION
  - HIGH PRODUCTION PROGRAMS
  - TEST BEDS FOR LOWER UNIT COSTS CONCEPTS
  - PRODUCTION COMPETITION OF ADVANCED SUBSYSTEMS
- ENCOURAGE COMPETITION BETWEEN CAPABILITY IMPROVEMENTS ON EXISTING SYSTEMS AND NEW STARTS
- CREATE AN ENVIRONMENT IN WHICH COMMERCIAL OR OFFSHORE PRODUCTS CAN ENTER THE SYSTEM

CHARTS 13, 14 & 15

Competition - Rationale

Material presented to the Task Force analyzed past experience which might support the intuitive feelings about the value of competition in reducing costs. The studies presented all addressed the value of competition, but the Task Force was not favorably impressed with the study results. They often analyzed special cases, assumptions were rationally questioned and the extrapolations appeared to be weakly supported. In spite of the weaknesses in the studies, the consensus of the Task Force remained positive.

The Task Force was asked to carefully examine the question of expanding competition to full scale development. It concluded that total development cost would be increased and the payback is indeterminate. While there may be other reasons for conducting full scale engineering development competitions, they are not justified from a unit cost reduction standpoint.

Competition - Limitations

There are limits to competition but there appears to be little quantification of these limits. Establishing competition takes time, and front end investment by DOD. In several case studies examined, it took 4-5 years to bring a production competitor on line.

CHARTS 13, 14 & 15 (Contd.)

These limitations are real but the Task Force does not want to leave the impression that competition should be restricted or restrained by policy. The policy should be followed that competition as a cost saving tool should be analyzed in each case and should be used carefully to get the most benefit.

Competition - Recommendations

Test beds for lower unit cost concepts could be utilized. Currently, test beds are almost universally used for "wringing out" high risk (and usually high cost) approaches. Test beds could also be useful in exploring concepts that lead to lower unit costs. Such test beds would provide iteration among developers and users to determine or demonstrate that lower cost approaches fulfilled tactical needs.

Appendix B

COMPETITION

Summary

The Task Force was requested to look at the potential of reducing unit cost through competition during Full Scale Engineering Development (FSED) and/or production, to determine the environment within which competition would be likely to reduce overall acquisition cost and, if feasible, to establish a methodology that could be used by DoD and/or the program manager to determine optimum use of competition in the acquisition strategy.

Data on the impact of competition was presented by the three Services, IDA and several industry sources. Information on development and production competition was reviewed and evaluated.

Very few completely valid examples were available to evaluate the effects of competition in development and the economic value of the competition in these developments is yet to be established.

Cost analyses by the Task Force were therefore made in lieu of availability of any substantive data of cost benefits of development competition. It was concluded that competitive development was unlikely to pay off unless substantial production rates over a long period of time were anticipated and the cost of development was a very small percentage of the acquisition cost. Development competition might, however, be warranted under unusual circumstances where, for example, a high risk alternative might offer substantial reliability and cost advantages if the development were favorable versus a more conservative and costly design approach.

About a dozen or more examples of competition in production of major systems were examined. Generally, the programs were characterized by large production rates (1000s/yr.) over many years. Savings from competition frequently were estimated after the fact with inadequate data using varying techniques and tended to be highly subjective. Estimates of savings from 10-30% were indicated. Due to the subjective nature of the analyses, the Task Force believes the results were overstated. Nevertheless, realizable savings of 10-15% after a discounted return on investment should be feasible for production competitions involving systems of modest complexity, high production rates and many years of production. A mature data package was found to be essential and 4-5 years are required to establish the second source. Development of the acquisition strategy during Phase 0 and/or I should materially improve the process and reduce the time required to establish competition. Production competition of low production rate complex systems or subsystems does not appear desirable even if the production can be projected for many (5-10) years.

A methodology for determining optimum use of competition in the acquisition strategy was not completed by the Task Force. Actions are underway by DoD with the assistance of the Task Force to achieve this objective.*

The following paragraphs provide more detailed discussion.

Competition in Development

Examples of competition in FSED were very limited (ALCM, GSRS, TADS are typical) at the system or major subsystem level and the bottom line on economic benefits still was not determined. Little had been done in these competitions in development to evaluate the competition viability in terms of discounted ROI (return on investment). Two more recent competitive developments are the Navy ECM pod and the Air Force JTIDS. The latter is especially unique in that each of the winning competitors in FSED will be required to qualify a follower under subcontract during FSED who will subsequently compete in production in a leader/follower arrangement. Again, no discounted ROI analysis has been made to show whether these program approaches are economically viable. All of the aforementioned programs need to be closely monitored for lessons learned by DoD or another appropriate source designated by DoD. All financial facets should be tracked to provide a data base for future competitions. Financial analyses concurrent with the competition should provide a running update on the benefits and costs of competition.

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*Assuming that DoD accepts the suggestions for one experiment in competition and the use of Task Force members in a follow-up role.

Lacking any historical data, an attempt was made to analyze a typical missile program to determine if there would be an economic payoff in competing development to the same requirement. Neglecting the increase in government cost for managing two contractors, the increase in cost for two contractors in OT&E, and the discounted ROI for front end investment, there was a net increase in cost in acquisition for retaining two contractors in continuous competition based on an assumed 15% reduction in production cost due to competition. The two programs produced an equivalent unit cost to a single program if a 30% reduction in production cost could be achieved. This case study was for a tactical missile with 17,000 missiles produced and both contractors fully qualified on the first production buy. All of the assumptions were optimistic in favor of competition. The Task Force concluded that competitive development for cost improvement in acquisition was unlikely to pay off unless: a) the development cost was a very small percentage of the total acquisition cost; b) the system being competed was projected to have a long production run; and c) would be procured in large quantities. It recommended that DoD task an appropriate source to establish a nomogram for analyzing when competition will provide cost benefits and to gather appropriate cost data for various weapon systems types necessary for its use.

Special circumstances may offer potential cost savings via competitive development. This is discussed in the section, Special Cases for Competition.

Competition in Production

A dozen or more examples of competition in production were examined including TOW, Dragon, AIM-7, AIM-9, Walleye, etc. By and large, they represented programs where thousands of relatively low complexity items were produced over a long period of time. The data available for review was limited and tended to be highly subjective, particularly in regard to estimated savings. There was no uniform technique utilized for estimating the cost with and without the benefit of competition except in an Army Research Office report.* In most cases, analyses of the effects of competition were done after the fact rather than before the competition to provide the basis for an acquisition strategy. Data were generally lacking on the total investment cost for bringing a second source into being.

Typically, the investment cost will include costs for the data package, data rights, implementation of the second source, a learning quantity, qualification of the second source and his major subcontractor's qualification, Operational Test and Evaluation, if required, support by the initial source, additional costs to the government for managing two sources, etc.

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*Determining and Forecasting Savings from Competing Previously Sole Source/Non-Competitive Contracts. Army Procurement Research Office, October 1978.

The minimum time to establish competition was three years with the norm four to five years with some as high as six years. In nearly all instances, the competition was "build to print" but "warrant to spec." which may be inconsistent. Advertised savings from competition varied from 10-30%. Due to the subjective nature of "what if analysis," there appeared to be a strong tendency to overstate the saving.

Nevertheless, it was the Task Force consensus that significant savings should be realized via competition in production. The conditions favorable to production competition were:

a) low to modest complexity
b) a mature data package
c) high production rate
d) long duration
e) viable sources with proven capability in the same or related product lines

Based on the above, a split buy, followed by a competitive buyout or winner take all when the end of production could be reliably forecast, provided a rational acquisition strategy.

With these conditions, net cost savings in production of 10-15% are believed to be realistically achievable after discounting initial investment. Other factors, such as maintaining a broad industrial base, increased surge capability, etc., also favor increased use of competition for programs where cost benefits of competition might be marginal.

Low rate production programs involving highly complex systems or subsystems did not appear to be appropriate subjects for production competition. Time and costs of establishing the second source, the difficulty of establishing an adequate data package and the major facility investment required mitigate against such competitions even though a production run of 10 years can be projected.

A number of observations are worthy of note. "Build to print" procurements severely limit the benefits of competition as does the tendency of the Service to freeze the design process once a mature design has evolved. An extreme example is the Navy AIM-7 where an outdated "cord wood" electronics design is still in production today, even though "cord wood" design became obsolete in the early 60s. Substantial production savings with improved reliability and maintainability, using modern electronic design, should have been feasible via a strong value engineering program. In contrast, the Army TOW program encouraged value engineering changes that improved both cost and/or reliability. This was more feasible with the TOW wooden round concept than with the more complex AIM-7. Nevertheless, the Task Force believes that opportunities to reduce cost are and will continue to be limited if an overly harsh "frozen design" approach is pursued. Appropriate selection of the level of interchangeability and repair early in the design process can provide a much higher level of flexibility to the producer. He then can exercise ingenuity in cost reduction compromising reliability, maintainability or support. These factors should be considered in Preliminary Design Review and Critical Design Review.

The Army and Navy, who had most of the experience in competition, both commented on the substantial increase in effort required to establish competition. They expressed concern regarding personnel resources if competition was too widely applied. Both indicated that the time required for verifying the data package and for establishing a viable second source reduced the number of opportunities significantly and that cost should not be an overruling factor (i.e., maintaining the quality of the product was a critical issue).

Frequently the initiation of competition has been instigated by dissatisfaction with the prime, using competition as a planned rather than long-term strategy to maximize the return for the government. The result of precipitious competition is that an adequate data package will not exist, data rights become a major issue, and an RFP must be generated in too little time. The substantial up front funding necessary for competition usually has not been established in the budget. All of the hurdles take time and money to correct. Clearly the acquisition strategy must be established up front per A-109 and 5000.1/.2 if these problems are to be avoided and optimum return for the government is to be realized.

Special Cases for Competition

Although competition in development is generally not economically viable except when the development cost is a very small percentage of the total acquisition, certain cases may mitigate in favor of competition. For example, a high risk but potentially lower cost and more reliable system may offer sufficient cost saving potential in production to warrant competition in development versus a higher cost proven technology concept. Similarly projections of threat 10-20 years hence tend to be highly speculative at best. Designing a system to meet the highest projected threat potential can be very costly but it may also be necessary. On the other hand, a much lower cost design may be closer to reality in terms of the real threat when it is ready for production. Hence, in areas where the threat is clearly uncertain and the front end cost is affordable, a high/low mix may be a suitable course to consider.

Other specialized cases for competition include use of a competition with off-the-shelf products. Commercial airplanes, trucks, bulldozers, generators, etc., fall into the category as do commercial computers and electronic components. Drastic departure from Mil Specs will be required, and may be desirable.

Competition with off-the-shelf hardware, product capability improvement, or foreign military equipment are other forms of specialized competition versus new system designs. (See Appendix D for discussion of product capability improvements.)

All need to be evaluated at Milestones O, I, and II.

Conclusions

It was concluded that production competition can reduce unit costs but that the product must be fully defined and there must be a reasonably high level of production planned. It was further noted that there must be substantially more "front end" investment planned if competing production lines appear desirable.

Full scale development competition was thoroughly discussed and it was concluded that it is useful only under special circumstances, probably limited to widely different concepts of systems. Full scale development competition clearly increases development costs and unless these costs are a very small percentage of the total program cost, the payback is doubtful. The Task Force found very little definitive evaluation by the Department of Defense on the real cost value of competition - particularly in the area of full scale development.

It has often been suggested that costs could be reduced if the military would use commercial products. It was found that, while this is an attractive idea, the application is difficult under current procurement regulations and logistic concepts. It appears that the military wants to "buy commercial" as long as it meets Mil Specs! This has little chance of success as a cost saving effort under these rules, but dropping the Mil Spec requirement (or the equivalent) may make a significant impact on unit procurement costs.

REPORT OF THE COMMISSION ON GOVERNMENT PROCUREMENT

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CHAPTER 3

The Statutory Framework

Statutes provide the foundation for the whole framework of Government procurement. They create agencies; define roles and missions; authorize programs; appropriate funds; balance public and private interests; provide for methods of procurement and for contract award procedures; and promote fairness, effectiveness, and uniformity in the procurement process.

The charter act of the Commission directed us to "study and investigate the present statutes affecting Government procurement" and to include in our report "recommendations for changes in statutes. . . ."[1]

This chapter is concerned with the need to unify the two basic procurement statutes and to improve statutory provisions on methods of procurement and on procedures for contractor selection. Part J deals with the potential for codifying procurement and procurement-related laws as well as with statutory matters not directly related to methods of procurement or procedures for contractor selection.

STATUTORY FOUNDATION

Recommendation 2. Enact legislation to eliminate inconsistencies in the two primary procurement statutes by consolidating the two statutes and thus provide a common statutory basis for procurement policies and procedures applicable to all executive agencies. Retain in the statutory base those provisions necessary to establish fundamental procurement policies and procedures. Provide in the statutory base for an Office of Federal Procurement Policy in the executive branch to implement basic procurement policies.

The procurement systems of the defense agencies, the Coast Guard, and the National Aeronautics and Space Administration (and to some extent the Central Intelligence Agency) are governed generally by the Armed Services Procurement Act of 1947 (ASPA).[2] The procurement systems of many civilian agencies are governed generally by title III of the Federal Property and Administrative Services Act of 1949 (FPASA).[3]

Consolidation or Conformance

We recognize that the two acts could be conformed to eliminate inconsistencies and incorporate the new principles we recommend. However, we think that a single consolidated act would focus attention upon procurement as a Government-wide operation and minimize the possibility of agencies obtaining independent statutory treatment. Our preference, therefore, is for a single consolidated statute to replace the two basic procurement acts, and thus eliminate the inconsistencies between them. In our judgment, a single act would provide the best assurance against the recurrence of inconsistencies.

Our studies revealed more than 30 troublesome inconsistencies between the two acts. For example, major inconsistencies involve:

- *Competitive Discussions.* ASPA requires,[4] but FPASA does not, that proposals for negotiated contracts be solicited from a maximum number of qualified sources and that discussions be conducted with all sources in a competitive range.

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[1] 41 U.S.C. 251 note, sec. 4(a) (1970).

[2] 10 U.S.C. 2301–2314; 50 U.S.C. 403(e) (1970).

[3] 41 U.S.C. 251–260 (1970).

- ***Truth in Negotiations.*** ASPA requires,[5] but FPASA does not, that contractors and subcontractors submit cost or pricing data.
- ***Negotiation Authority for Research and Development.*** Both acts require agency head approval to negotiate research and development (R&D) contracts. Under ASPA someone below the head of the agency can approve contracts of up to $100,000.[6] Under FPASA, the limit is $25,000.[7]
- ***Negotiation of Certain Contracts Involving High Initial Investments.*** ASPA includes,[8] but FPASA does not, an exception to the advertising requirement for negotiating certain contracts requiring a high initial investment.
- ***Specifications Accompanying Invitations for Bid (IFB).*** ASPA states that an inadequate specification makes the procurement invalid.[9] Comparable language is not found in FPASA.

Although some of the inconsistencies stem from special problems originally encountered by only one or a limited number of agencies, most of them arise simply because there are two basic procurement statutes, and because each is amended at different times in different ways by different legislative committees. These basic inconsistencies have proliferated to an overwhelming degree in the "flowdown" from the statutes to agency, bureau, and local policies, regulations, procedures, and practices. This results in serious inefficiencies and adds enormously to the procurement-related costs incurred by the Government and its contractors.

The merger of ASPA and FPASA into one Government-wide statute will minimize the need for future amendments, although special problems will have to be treated by specific provisions in the merged statute. However, these occasions will be fewer in number because problems that originally were unique to one or a limited number of agencies have tended to become problems for other agencies and have required separate legislative treatment each time the problem arose.

A case in point is the provision of ASPA, but not in FPASA, that allows negotiation where performance requires a large initial investment.[10] In the 1940's this provision only had application to the Department of Defense (DOD). Special legislation was required later because the Department of Transportation needed similar authority for its air navigation equipment contracts.[11] The need for this negotiation authority may increase as other civilian agencies become involved in more expensive and more technical procurements.

Many of the differences between the acts arose through legislation initiated by a congressional committee which had jurisdiction over only one of the basic acts. For example, the Truth in Negotiations Act and the statutory provisions requiring competitive discussions were added to ASPA but not to FPASA. Thus, major substantive issues were resolved in only one act because the legislation had been drafted to cover the military departments only.

A comparable situation occurred recently when Congress enacted Public Law 92–582, establishing Federal policy with respect to the selection of architect-engineers. The statute amends FPASA but not ASPA. Although the Senate Report (92–1219) noted this fact, it concludes that DOD was already following the new provisions and no amendment to ASPA was needed. The result is that the civilian agencies are required by statute to have "discussions" with A–E firms before making a selection but not for other types of contracts. On the other hand, DOD is not required to conduct "discussions" with A–E firms but is required to conduct discussions for other types of contracts.

Another example is the addition of language in ASPA requiring complete specifications to be prepared in connection with invitations for bid under formal advertising. The new language[12] was added to ASPA as part of a bill primarily intended to amend the Small Business Act and was processed by the committees having jurisdiction over that act. The legislative history does not explain or even mention that the bill would change only one of the two basic procurement acts.

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[4] 10 U.S.C. 2304(g) (1970).
[5] 10 U.S.C. 2306(f) (1970).
[6] 10 U.S.C. 2311 (1970).
[7] 41 U.S.C. 257(b) (1970).
[8] 10 U.S.C. 2304(a)(14) (1970).
[9] 10 U.S.C. 2305(b) (1970).
[10] 10 U.S.C. 2304(a)(14) (1970).
[11] 49 U.S.C. 1344(e) (1970).
[12] 10 U.S.C. 2305(b) (1970).

The present statutory foundation is a welter of disparate and confusing restrictions and of grants of limited authority to avoid the restrictions. This problem has arisen in part because Congress has never been called on to focus its attention on the overall procurement process. The inaction of top managers of the executive agencies has aggravated the problems.

Although both DOD and NASA are governed by ASPA, each relies on its separate organic act or on general statutory provisions[13] to issue separate and often unnecessarily inconsistent procurement regulations.[14] Some provisions of FPASA give the appearance of minimizing the multiplicity of agency regulations; they give either the President or the Administrator of the General Services Administration (GSA) authority to prescribe regulations or policies.[15] However, FPASA effectively or potentially excludes from GSA regulations[16] the major procurement activities which come under its "no impairment" provision.[17] The "no impairment" provision is a broad, ambiguous statement which provides that nothing in FPASA shall impair or affect the general authority of certain named agencies or specified functions of other designated agencies.

The agencies have differed in their approach as to what they consider an "impairment." The Atomic Energy Commission (AEC) generally has followed GSA's Federal Procurement Regulations (FPR), but in a few cases has decided to adopt more "liberal" regulations under the broader statutory authority of its organic act. The Tennessee Valley Authority (TVA), on the other hand, has interpreted the "no impairment" provisions as giving it authority to disregard the FPR's completely.[18]

The statutory foundation must be changed if significant improvements in unifying procurement policies and procedures are to be achieved. Consolidation of the procurement statutes would be a major step in fostering a single regulatory system which would help rather than hamper those wishing to do business with the Government.[19] It also would focus attention on the fact that procurement is a Government-wide operation and would discourage attempts by parochial interests to obtain special statutory treatment.

Greater statutory uniformity may be viewed by some as a threat to the special missions of executive agencies. Such a fear is unfounded. Our recommendations contemplate Congress confining its dictates to fundamental matters. Under our recommendations, the regulatory system will assume the responsibility of amplifying congressional direction and of creating such restrictions or safeguards as may apply only to some agencies or that prove essential only for limited periods. This approach provides the best balance of congressional control and executive efficiency. It minimizes the burden on a busy Congress. It also recognizes that, when feasible, administrative action by regulation is quicker, more specific, and more readily adaptable to necessary change. Such latitude is essential to the use of procurement techniques which best ensure the success of a Government program.

Sharing of responsibility for procurement policy between the legislative and executive branches is consistent with the practice in other policy areas; that is, Congress establishes the general framework of a national priority and the executive branch is charged with the responsibility to implement the approved program. The need for executive branch latitude to fill in the details by regulation is particularly acute in Government procurement because of the number of techniques and technologies involved; the frequency and volatility of change; the close connection between procurement and agency missions; and the multitude of detailed policies, procedures, guidelines, and controls attending the process.

Executive branch latitude, however, cannot justify accelerating the issuance of conflicting regulations. The success of procurement within the statutory framework we recommend will require strong leadership in the executive branch and a means for implementation of the statutory policies governing procurement. Only such leadership can ensure a more consistent treatment of day-to-day procurement problems and a more harmonious and responsible relationship with Congress.

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[13] For example, 10 U.S.C. 2202 and 5 U.S.C. 301 (1970).

[14] These agencies are not required to comply with regulations issued pursuant to FPASA. See 41 U.S.C. 252(a)(1) (1970).

[15] See 40 U.S.C. 481(a)(1) and 486(a) and (c); and 41 U.S.C. 252(a) (1970).

[16] 41 U.S.C. 252(a)(2) (1970).

[17] 40 U.S.C. 474 (1970).

[18] The matter of diversity in regulations is discussed in greater detail in Chapter 1.

[19] See Chapter 4, for the discussion and recommendation to establish a system of Government-wide coordinated procurement regulations.

Summary

The unconsolidated structure of the two primary procurement statutes generate unessential or troublesome distinctions in basic procurement policies and procedures of various components of our Government. A clear rationale does not exist for two acts setting forth separate policies and procedures for that part of the Nation's business conducted by contract; or for either of them permitting the extent of diversity exhibited by today's regulatory systems. Efficiency, economy, and effectiveness of Government procurement would be increased if:

- The basic procurement statutes were consolidated
- The consolidated statute concentrated on fundamental procurement policies and procedures
- The fundamental procurement policies and procedures were implemented under the leadership of the Office of Federal Procurement Policy.

FUNDAMENTAL POLICIES FOR A CONSOLIDATED STATUTE

Background

The procedure by which the Government solicits offers, establishes terms and conditions, and selects a contractor, is the heart of the procurement process. The statutes traditionally have classified these methods as either "formal advertising" or "negotiation." The terminology and distinctions connoted by the terminology obscure as much as they explain. Understanding these terms, and the relation they bear to the degree of competition available in markets from which the Government procures, is essential to understanding our recommendations concerning competitive methods of procurement.

FORMAL ADVERTISING

"Formal advertising" denotes a sealed-bid technique of obtaining offers from several competitors. The rules of this sealed-bid procedure are designed to forbid "private" bargaining and to encourage open disclosure upon award. Formal advertising presumes a specification that dictates a common baseline of technical features and contract terms. This in turn obviates any need for discussions with competitors about their bids and provides an objective means for distinguishing among capable competitors on the basis of price. Therefore, a fixed-price contract is always awarded to the lowest-price offeror, provided he does not take exception to the specification and is a responsible producer. These and other rules discourage a buyer's inclination to unfairly favor award to one contractor over another.

Private business generally does not refer to any of its procurement practices as "formal advertising." Occasionally, they do use a sealed-bid technique in which they "advertise" a procurement to potential suppliers. However, they are not as likely to broadcast their solicitation of offers as widely as does the Government, to commit themselves as unequivocally to accept the lowest price received, or to foreclose the possibility of having discussions with an offeror before awarding him a contract (as the Government does when it announces it will use the "formal advertising" method of procurement).

NEGOTIATION

Negotiation permits contracting agencies greater latitude in the selection of contractors than is allowed by formal advertising procedures. It embraces procurements in which all potential contenders are invited to participate as well as those that involve only one seller. We are concerned here only with those which are publicized widely for competition.[20] Some of these contracts are awarded on a fixed-price basis, others on a cost-reimbursable basis.[21]

In negotiated fixed-price competitions the Government usually does not rely on the prices initially submitted by competitors. The comparability between initial offers generally is insufficient to judge the relative merits on the basis of the common denominator of price. For this or other reasons, contracting agencies ordinarily conduct discussions or bargaining with the competitors in the course of entering into a fixed-price contract with the one who offers the best terms.[22]

In competitive negotiations involving cost-type contracts, the offerors submit cost estimates rather than fixed prices. The fact that a cost-type approach is used generally indicates that the primary interests of both the competitors and the contracting agency will focus on relative technical competence, not price "guesstimates."

The single element which most acutely distinguishes negotiation techniques from formal advertising is the subjective judgment which weighs quality and other factors against price; these judgments are referred to as "tradeoffs." Formal advertising, in effect, resolves all "tradeoffs" by specifying a common product before offers are solicited. Only products conforming to that specification can represent the best, and indeed the only, deal for the Government, subject solely to the variable of the prices which will be submitted. Negotiation, on the other hand, uses a more general or more complex specification which asks the seller to recommend the combination of those aspects of the solicitation he thinks will represent the best deal to the Government; all aspects are variables to be considered in selecting the contractor. Price is likely to be an important, often critical aspect in competitively negotiated fixed-price contracts, and not as likely to be so in cost contracts.

COMPETITION

Competition is not a procurement technique. It is a phenomenon of the marketplace, and the extent to which it exists in any given marketplace ordinarily is not influenced by the method of procurement employed. Competition is the effort of sellers, acting independently of each other and offering products or services that are reasonably close substitutes for those offered by other sellers, to secure the business of the buyer by proposing the most attractive contract terms.

Formal advertising is one means of obtaining competition. It involves a broad solicitation of offerors, but so do competitively negotiated procurements. Although fixed-price contracts are always used in formal advertising, this feature also is not peculiar to that method of procurement; they are used as well in many negotiated procurements. Further, the desire among competitors for winning the award should be equally strong regardless of which method of procurement is used. The unique feature of the Government's formal advertising technique is its insistence on offers of products or services which are *essentially identical*, regardless of which competitor is selected.

Many procurements involve an item that is not sufficiently comparable to others available from the same general market to make an award on the basis of price without discussions with the offeror. In these circumstances, the technique of negotiation affords the best opportunities to obtain the most effective competition available. It permits discussions with competitors for the purpose of more precisely defining achievable requirements, or otherwise obtaining sufficient comparability between offers, in order to reach a common understanding of the specifications. By enhancing the degree of competition in this manner, the Government may be able to validly select the contractor on the basis of price and thus consummate a fixed-price contract.

Cost-type competitions often involve markets quite dissimilar to those in which fixed-price competitions take place. The end items may be of such magnitude and exhibit so many unknowns that initially no one can draw specifications that realistically dictate a common technical baseline for all offerors; nor can the parties agree to fixed-price contracts which provide for reliable price comparisons of common baseline products. The acquisition of major systems usually is characterized by these features.

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[20] Sole-source negotiation is discussed later in this chapter.

[21] Generally, a contract awarded on a cost-reimbursable basis is one where the Government promises, for performance of a contract, to pay: (1) the reasonable, allocable, and allowable cost of performance, as determined by predetermined cost principles and the terms of the specific contract (see ASPR 7-203.4 and ASPR, sec. XV, part 2); and (2) a fee, where applicable.

[22] Competitive negotiations in fixed-price contracts is further discussed with respect to Recommendation 4, under "Competitive Discussions for Fixed-Price Contracts."

Another illustration is the procurement of R&D. Here the competition is generally characterized by several rival sellers offering proposals which are not expected to exhibit a broad baseline of comparable features. The Government deliberately asks rival R&D sellers to focus on innovative and individualistic approaches; thus the offers received are unlikely to exhibit the common technical baseline essential to reasonable price comparisons. In addition, the performance of these services may involve such risk that use of a fixed-price contract is not feasible.[23]

Statutory Standards for Competitive Negotiation and Formal Advertising

Recommendation 3.

(a) Require the use of formal advertising when the number of sources, existence of adequate specifications, and other conditions justify its use.

(b) Authorize the use of competitive negotiation methods of contracting as an acceptable and efficient alternative to formal advertising.

(c) Require that the procurement file disclose the reasons for using competitive methods other than formal advertising in procurements over $10,000, or such other figure as may be established for small purchase procedures.

(d) Repeal statutory provisions inconsistent with the above.

REQUIRED USE OF FORMAL ADVERTISING

Many Government procurements are entirely suitable for fixed-priced formal advertising. The prerequisite for its use, however, is an adequate specification and a number of competitors sufficient to assure the Government's receiving the best deal if it commits itself to accept the lowest bid of a responsible contractor. We recommend, therefore, that formal advertising, the competitive procurement method exhibiting the greatest safeguards against favoritism, be preferred whenever market conditions are appropriate for its use. Toward this end, we also recommend that contracting officers be required by statute to document their reasons for not using formal advertising in a competitive procurement.

Our recommendation exempts procurements under $10,000, or such other figure as may be established from time to time for small purchase procedures, from the statutory rules of solicitation which ordinarily would apply.

UNDUE RESTRAINT AGAINST COMPETITIVE NEGOTIATION

ASPA and FPASA provide that formal advertising is the preferred method for conducting Government procurement. Both statutes authorize the use of negotiated procurement, but restrict its use by numerous procedural requirements that are not related to market conditions. ASPA provides 17 and FPASA provides 15 exceptions to the requirement for use of formal advertising. Each requires that a particular condition exist in order to use negotiation instead of formal advertising.[24] Many of the exceptions require written findings and determinations, and some also require approval by the agency head. Still other provisions limit the authority of the agency head to delegate his approval function.

Nevertheless, the Government uses formal advertising for purchasing only from 10 to 15 percent of its needs in terms of reported contract award dollars.[25] The pattern of using competitive negotiations instead of formal advertising has arisen only in the last three decades. During that period, first the urgency and demands of war, and then national domestic priorities, compelled Government to meet more of its needs by advancing the state of technology rather than by purchasing items "off the shelf." This development—not the conjecture that agency officials intentionally and increasingly disregard the law—explains the decline in the use of formal advertising. In recent years, many Government requirements do not lend themselves to the form of specifications needed for "formal advertising." Creating such specifications to procure items beyond the existing state of technology is not realistic.

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[23] Competition in cost-type contracts is further discussed with respect to Recommendation 4, under "Competitive Discussions for Cost-Type Contracts."

[24] See 10 U.S.C. 2304(a)(1)–(17) and 41 U.S.C. 252(c)(1)–(15). Our recommendations involve repealing those sections, as well as those concerned with justifying the use of negotiated cost and incentive-type contracts. Some of the decisions made pursuant to these sections are final and not reviewable by the General Accounting Office. See 10 U.S.C. 2310 and 41 U.S.C. 257. The mechanics of repeal will involve either rewriting or eliminating the finality presently accorded some administrative decisions to negotiate. We take no position on whether the current prohibition against GAO review should be eliminated or substantially retained with new statutory language.

[25] Calculated by the Commission. See recent annual reports, *Military Prime Contract Awards*, DOD, and *Procurement for Civilian Agencies*, GSA, Office of Finance. These sources also indicate that

Simply identifying the conditions which justify negotiation is time-consuming. When the statute also requires that such justification be put in writing, more time and expense is consumed. Of even greater importance is the fact that when the contracting officer's written justification must be approved at higher levels, the process often is wasteful and even more expensive and time-consuming.

These justification provisions are intended to discourage sole-source negotiation. However, they also may restrain the use of competitive negotiation to satisfy requirements for imprecise, changeable, and sometimes unique products and services. Competition in the markets where these requirements must be satisfied cannot be achieved by the use of formal advertising. The point is not that there should be more negotiation and less advertising but that competitive negotiation should be recognized in law for what it is; namely, a normal, sound buying method which the Government should prefer where market conditions are not appropriate for the use of formal advertising.[26]

Formal advertising can be as inappropriate in some Government procurements as it is appropriate in others. Since its use in many potentially competitive circumstances is inappropriate, it should not be encouraged, much less preferred, in those circumstances. When competitive negotiations are the appropriate procurement technique, the statute should not require Government officials to indulge in expensive, wasteful, and time-consuming procedures to carry out congressionally authorized missions.

UNDUE RESTRAINTS AGAINST THE USE OF COST-TYPE CONTRACTS

The current statutes[27] provide that cost-reimbursable and incentive contracts cannot be used without a finding either that such contracts probably will be cheaper or that it is impractical to use any other type of contract.[28] However, in numerous situations the use of cost-reimbursable or incentive contracts is desirable, even if fixed-price contracts could be used or might be cheaper. Many of these are competitively awarded and include procurements where the use of a fixed-price contract would involve an inordinate risk or where the procuring agency wishes to motivate the contractor to apply his efforts toward specific elements of contract performance.

Where a cost-reimbursable or incentive contract promises no net advantage over a fixed-price contract, public policy rightly favors the use of the fixed-price contract. In competitively negotiated procurements, it provides the greater assurance that the benefits of competition have been obtained and employed. However, conjectures that one type of contract will prove more expensive than another or otherwise be "impractical" to use generally are pure speculation. Nor is there any reliable way of validating whether the prediction was an accurate one. Consequently, the finding or prediction required by the present statute is a hollow requirement and in practice is generally satisfied by findings which merely repeat the language of the statute.

We believe the procurement statutes should not stigmatize cost-reimbursable and incentive contracts and require their use to be accom-

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small business set-aside contracts, which are restricted to small business but are also awarded by formal advertising techniques, account for approximately an additional four to five percent of reported Government procurement award dollars. In terms of the number of reported procurement actions in DOD during fiscal 1972, the restricted and unrestricted use of formal advertising techniques totaled approximately 11.4 percent of all military procurement actions of $10,000 or more.

[26] See similar point made by the Task Force on Procurement, *Military Procurement*, 1955, p. 24, prepared for the Commission on Organization of the Executive Branch of the Government.

[27] 10 U.S.C. 2306(c) and 41 U.S.C. 254(b) (1970).

[28] They also contain an absolute prohibition against "cost-plus-a-percentage-of-cost" contracts, which prohibition we recommend be continued. See 10 U.S.C. 2306(a) and 41 U.S.C. 254(b) (1970).

panied by findings which, as a practical matter, can rarely be supported by verifiable evidence.

CONCLUSIONS

Our recommendations encourage the use of competitive procurement procedures. They endorse a preference for formal advertising wherever practical but eliminate the wasteful and unnecessarily expensive exercise—in both time and money—of having high-level agency reviews of decisions to use competitive procedures other than formal advertising. Thus, procuring agencies will be directed to use appropriate techniques to obtain the best possible competitive results.

Competitive Discussions

Recommendation 4. Adjust the statutory provision on solicitations and discussions in competitive procurements other than formal advertising in the following manner:

(a) Extend the provision to all agencies.

(b) Provide for soliciting a competitive rather than a "maximum" number of sources, for the public announcement of procurements, and for honoring the reasonable requests of other sources to compete.

(c) Promulgate Government-wide regulations to facilitate the use of discussions in fixed-price competitions when necessary for a common understanding of the product specifications.

(d) Require that evaluation criteria, including judgment factors to be weighed by the head of an agency when he is responsible for contractor selection, and their relative importance, be set forth in competitive solicitations involving contracts which are not expected to be awarded primarily on the basis of the lowest cost.

EXTENSION OF ACT TO ALL AGENCIES

The only general legislative requirement for written or oral discussions in negotiated procurements is found in ASPA, as amended:

> . . . proposals, including price, shall be solicited from the maximum number of qualified sources consistent with the nature and requirements of the supplies or services to be procured, and written or oral discussions shall be conducted with all responsible offerors who submit proposals within a competitive range, price, and other factors considered: *Provided, however,* that the requirements of this subsection with respect to discussions need not be applied to procurements . . . where it can be clearly demonstrated from the existence of adequate competition or accurate prior cost experience with the product, that acceptance of an initial proposal without discussion would result in fair and reasonable prices . . .[29]

Civilian agencies currently are not subject to a similar general statutory prohibition against dealing with only one of the competitors they solicit for a negotiated procurement.[30] They are covered only in the FPR which, unlike the statutory requirement, provide[31] that competitive discussions are not mandatory for some procurements; for example, cost-reimbursable and R&D contracts.

We believe a statute requiring discussions in competitively negotiated procurements is fundamental to protecting the Government's interest, and that its requirements should be applied uniformly throughout the Government.

REVISIONS TO STATUTORY REQUIREMENTS

Ten years of experience with the law on competitive discussions indicates that modest changes are desirable. Some of these changes appear to be evolving through regulations and decisions interpreting the law; others require legislation. These are discussed below.

"MAXIMUM" SOURCES

Under 10 U.S.C. 2304(g), solicitation of proposals is required "from the maximum number of qualified sources consistent with the nature and requirements" of a procurement. Translating this requirement to practice poses a vexing problem.

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[29] 10 U.S.C. 2304(g) (1970).

[30] Congress enacted the requirement for discussions in Public Law 87-653. Recently, Congress enacted Public Law 92-582 requiring agencies subject to FPASA to conduct "discussions" in obtaining architect-engineer services by contract.

[31] FPR 1-3.805.

R&D procurements, probably more than any other, embody the two characteristics which give rise to the problem; namely, a large number of firms seeking Government contracts and relatively complex proposals which are costly to prepare and evaluate. Under these circumstances, total solicitation costs may exceed the value of the contract. Moreover, most R&D procurements seek innovative ideas and frequently cannot be considered as essentially cost or price competitive. Therefore, the participation of a maximum number of firms does not necessarily ensure minimum costs to the Government, a primary purpose of the statute. Participation by a "maximum" number of firms in such situations may unduly complicate the selection process and add considerably to both the procuring agency's and the offerors' costs.

Several agencies now interpret the statute to permit limiting the initial issuance of requests for proposals (RFPs) to a reasonable number of firms deemed most competent. Others are reluctant to follow this practice. They believe a blanket issuance of the RFP and the evaluation of all proposals is easier, safer, and possibly less costly than attempting to justify a limited solicitation. Moreover, some consider that the intent of Congress, as reflected in the statute, requires that all doubts be resolved in favor of "maximum" solicitation.

Providing in the statute for the solicitation of a "competitive" rather than a "maximum" number of sources in negotiated procurements should convey the intent that the desirable number of sources depends on the conditions which prevail in the market at the time the purchase is made. We recognize that this change could foster favoritism for certain contractors; that is, only "favorites" might be invited to submit proposals. To prevent this abuse, we recommend retaining the statute which requires public announcement of procurements[32] and adding to it a requirement that agencies honor all reasonable requests by uninvited offerors to compete.

COMPETITIVE DISCUSSIONS FOR FIXED-PRICE CONTRACTS

An exception in ASPA permits an agency conducting a competitively negotiated procurement to select a contractor on the basis of his initial offer, without discussions with any of the competitors.[33] When Congress was considering the exception language in the legislation, GAO's view was that it would curtail competition. GAO was concerned that the contracting agency would not be in a position (without the benefit of discussions) to determine with any degree of certainty the reasonableness of estimated costs and proposed prices. Congress, however, accepted DOD's position that the statutory requirement for discussions include the exception permitting awards without discussions. DOD believed that the exception would discourage offerors from submitting padded initial prices.

GAO's concern appears to have been directed toward the use of fixed-price contracts in negotiated procurements. It cited an example where the contracting agency rejected formally advertised bids because of a statutory technicality. The agency later conducted a "negotiated" procurement for the same items, without competitive discussions, and accepted a low offer from a contractor which was about $20,000 higher than the offer he made in the formally advertised procurement. GAO maintained that discussions would prevent these abuses without encouraging padded offers, since competitors would hesitate to submit unnecessarily high offers that eliminated them from the competitive range.

Our studies suggest that offerors will not be deterred from including substantial contingencies in initial offers.[34] Moreover, we believe there is a likelihood of the Government's inadvertently accepting higher offers under fixed-price contracts if discussions are not held. This could occur when an offeror anticipates discussions with the Government to establish a common understanding of an imprecise specification and wishes to leave a margin in his initial price or contract terms to facilitate making appropriate concessions. For example, his experience might be that the Government often discovers through discussions that its needs are not adequately defined by the specification and asks the offeror to go beyond what is literally required by the specification without increasing the original bid price. Inadvertent acceptance of unnecessarily high offers also might occur as a result of divergent understandings of an imprecise specification; this could lead to a higher quality product than actually is needed.

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[32] 15 U.S.C. 637(e) (1970).

[33] Offerors must be advised of the possibility that discussions may not be conducted, and the prices received must appear reasonable to the contracting officer. The exception applies to both cost-type and fixed-price contracts.

[34] Responses to a question raised by Study Group 8 (Negotiations and Subcontracting), disclosed that more than half of the Government buyers interviewed on this point thought sellers did not pad their offers; over half of the sellers believed they did. (See Study Group 8, *Final Report*, vol. II, appendix F.

When the specifications are inadequate for formally advertising the procurement, they also are unlikely to be adequate for negotiating a fixed-price procurement without competitive discussions. The low offer may be a higher price than the Government need pay, or it may offer a lower quality product than is acceptable. In short, if the specification is not sufficient to assure a common understanding by all offerors, thereby permitting a choice between offers on the basis of price, then such offers may be too high or too low, and in either event, unacceptable.

In these circumstances, the procurement regulations should require the Government to conduct discussions for the purpose of establishing a common understanding of the specifications. Such an understanding usually should permit contractor selection on the basis of the lowest price finally offered.

The statutory changes we recommend do not say how long discussions should be conducted in the attempt to achieve a common understanding of the specification. The statute should not dictate that Government buyers bargain endlessly in order to achieve such common responses to a specification as to permit selection primarily on the basis of price. This must be left to the common sense and discretion of the Government buyer.

COMPETITIVE DISCUSSIONS FOR COST-TYPE CONTRACTS

The extensiveness of competitive discussions, rather than the absence of discussions, has been a recurring complaint of contractors dealing in cost-reimbursable and R&D contracts. Representatives of the R&D industry believe that technical portions or ideas of one competitor's proposal commonly are "transfused" into another's. They allege this occurs during competitive discussions, especially when the Government points out deficiencies in a competitor's proposal and invites him to change and improve it.

They further allege that discussions in R&D procurements have been used to achieve the comparability between competing "products" which one expects in formal advertising. This tends to bring the offer of each proposer to a common level of technical excellence. Such "technical leveling" can foster a Government practice of "auctioning" the contract to the proposer who bids the lowest price.

Recent changes in procurement law suggest that agencies now are devoting much attention to this matter and that these problems may not continue to be considered acute.[25] However, the lines of distinction between improvements initiated by the offeror and those to which the Goverment may allude, on the basis of its knowledge of others' ideas, is often a difficult one to draw. Creating sensible rules in statutes, regulations, or legal decisions to facilitate drawing the line between competitive endeavors and "technical transfusion" is a hard task.

In view of the recent attempts to avoid

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[25] In U.S. Comptroller General transmittal letter (p. 1) and decision B-173677 (p. 32), Mar. 31, 1972, which denied a protest against NASA's alleged illegal failure to discuss deficiencies in the protestor's R&D proposal, the Comptroller General observed:

> . . . This is a research and development procurement in which the offeror's independent approach in attaining the desired performance is of paramount importance . . . Obviously, disclosure to other proposers of one proposer's innovative or ingenious solution to a problem is unfair. We agree that such "transfusion" should be avoided. It is also unfair, we think, to help one proposer through successive rounds of discussions to bring his original inadequate proposal up to the level of other adequate proposals by pointing out those weaknesses which were the result of his own lack of diligence, competence, or inventiveness in preparing his proposal.

Also see NASA Procurement Regulation Directive 70-15 (revised), Sept. 15, 1972, providing that in cost-reimbursement and R&D competitive procurements, the contracting agency shall not point out to competitors the deficiencies in their proposals which inhere in their management, engineering, or scientific judgment.

"technical transfusion" and "auctioneering," the complexity of the subject, and the present state of flux in implementing the statute, we have concluded it would be inappropriate at this time to recommend detailed statutory revisions.

EVALUATION CRITERIA

The procuring agencies use different procedures for evaluating proposals. The procedure most commonly used for larger or more complex procurements in which price may be only one of numerous considerations requires that evaluation criteria be established prior to soliciting offers. Evaluation criteria apprise competing sellers of the features, in addition to cost, the Government considers important to the purchase and their relative importance to each other. The criteria also alert Government technical specialists, who may not be the ones who devised the criteria, of what to look for and what weight to give to certain aspects of the proposal in scoring or otherwise evaluating it.

The statutes currently are silent on the evaluation criteria the Government uses to select a contractor, although this is a matter of major importance. Proposers often complain they cannot adequately respond to solicitations because the evaluation criteria do not indicate the relative weight the buyer attaches to various elements of the specification or proposed contract terms.

The procuring agencies have reservations about communicating the relative importance of evaluation criteria. They fear such disclosure may result in the buying officials and the sellers relying too heavily on the mechanics of the scoring system instead of using their own judgment. They also believe that the Government might award contracts to inferior firms which had a slightly higher "score" than a superior competitor, that competitors might be inhibited from submitting innovative ideas which did not agree with the evaluation criteria, and that GAO might be inclined to uphold protests on the ground that award was not made to the competitor with the highest score. The weakness in these observations is that neither law nor common sense supports the likelihood of their occurrence.

Nothing could be more basic to sellers than knowing what the buyer really wants. Without knowledge of the relative importance of evaluation criteria, sellers can determine only partially what the procuring agency considers important. Withholding uniform and formal disclosure of such information may, on occasion, lead to some sellers learning more than others about what the agency regards as important.

Acceptance of our recommendation to communicate the relative importance of evaluation criteria would create greater public confidence in the procurement process, motivate procuring agencies to give greater attention to defining what they want from sellers, and facilitate the preparation of more responsive proposals.

Post-Award Policy

Recommendation 5. When competitive procedures that do not involve formal advertising are utilized, establish that agencies shall, upon request of an unsuccessful proposer, effectively communicate the reasons for selecting a proposal other than his own.

Letting an offeror know why he lost a competition contributes to his ability to compete for future solicitations. It also adds to the general confidence in the fair application of the rules and procedures governing Federal procurement. Today there are no statutory requirements or uniform practices for informing losing offerors why their proposals were not considered as advantageous to the Government as the winning contractor's.

Losing competitors believe they should be, but frequently are not, provided with enough details on the relative value of their proposals. Consequently, existing practices often result in informal complaints as well as formal protests to force adequate disclosure. We believe the Government will receive better proposals and gain more credibility if a statutory base exists for honoring the post-award requests of losing offerors for the reasons why the contractor was selected.

SOLE-SOURCE PROCUREMENT

Recommendation 6. Authorize sole-source procurements in those situations where formal advertising or other competitive procedures cannot be utilized, subject to appropriate documentation; and, in such classes of procurements as determined by the Office of Federal Procurement Policy, subject to the determination being approved at such level above the head of the procuring activity as is specified in agency regulations.

One reason for public concern over the procurement process is the high proportion of noncompetitive (sole-source) contracts awarded by the Government. Nevertheless, in many instances, because of urgency, lack of a reasonable competitive source, standardization, or other factors, the contracting agency has no realistic alternative to soliciting an offer from one firm. This is particularly true in DOD, NASA, and AEC, where costly items of high technology frequently are needed. For fiscal 1972, 58.6 percent of the reported DOD military procurement dollars involved noncompetitive procurements.[36]

ASPA and FPASA have provisions that limit negotiation, regardless of whether the negotiation is a competitive or a sole-source procurement. We have recommended removing the statutory restrictions insofar as they apply to competitively negotiated procurement. Lifting the restrictions against competitive negotiations, however, requires adoption of statutory safeguards for noncompetitive negotiations.

Our recommendations introduce additional safeguards. Written determinations for failure to use formal advertising are not required today for seven of the exceptions under ASPA and 11 of the exceptions under FPASA. Our recommendation would require written documentation in the file for all cases over $10,000 where formal advertising is not used and where only one source is solicited.

Moreover, the documentation in some of these procurements would require approval at an agency level above the head of the procurement office. The rationale for this is the fact that some potentially sole-source procurements will involve large expenditures or otherwise be of a sensitive nature. In such cases, we believe the issue of whether competition can be obtained should not be decided at the level within the agency which is most likely to be biased.

We recommend that the Office of Federal Procurement Policy decide which classes of sole-source procurement should be approved at a level above the contracting officer. We would leave to the discretion of each agency the exact administrative level from which the contracting officer should seek approval because the level at which an independent and detached judgment can be expected may vary.

SPECIAL PROCUREMENT TECHNIQUES

Small Purchase Procedures

Recommendation 7. Increase the statutory ceiling on procurements for which simplified procedures are authorized to $10,000. Authorize the Office of Federal Procurement Policy to review the ceiling at least every three years and change it where an appropriate formula indicates the costs of labor and materials have changed by 10 percent or more.

Under ASPA and FPASA, procurements in excess of $2,500 must be made pursuant to the statutory rules for formal advertising or negotiation. Simplified procedures are authorized in procurements of less than $2,500. These procedures include the use of competitive techniques but need not be encumbered by either the sealed-bid requirements of formal advertising or the administrative burdens ordinarily associated with a negotiated transaction. Their use is not conditioned on a written explanation of why formal advertising is not feasible or, when a single source is solicited, why competition is not being obtained.

The limit of $2,500 was placed on small purchases in 1958. Data for fiscal 1972 in-

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[36] U.S. Department of Defense, *Military Prime Contract Awards, July 1971–June 1972*, p. 40. Of these dollars, the Commission calculated that 32.4 percent were "follow-on" to contracts which originally had been awarded on a competitive basis, and 67.6 percent were other sole-source procurements.

EM-208-1-WA

SUSTAINED COMPETITION FOR DEFENSE PROCUREMENTS: EVIDENCE, THEORY AND APPLICATIONS

27 April 1982

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FOREWORD

This paper presents the results of acquisition research and analyses undertaken by The Analytic Sciences Corporation (TASC). Recent research efforts have concentrated on the development and refinement of a cost estimating model that incorporates consideration of production quantity, variations in production rate, and the impact of competition. This paper briefly describes the general model, presents empirical evidence of the impact of competition, discusses the implications of cost growth on the selection of an acquisition strategy, and concludes with an illustrative example.

A more concise edition of this paper was recently presented at the 1982 Federal Acquisition Research Symposium.

3. COMPETITION DURING PRODUCTION

Numerous studies have attempted to estimate the impact of competition on weapon systems acquisition costs. The results of some of these prior studies are presented in Table 3-1.

TABLE 3-1
RESULTS OF PRIOR STUDIES

Sponsor	Year	Number of Systems	Average Savings (%)
IDA	1979	31	31
APRO	1978	11	12
ARINC	1976	13	47
IDA	1974	20	37
LMI	1974	1	22
LMI	1973	NA	15-20
JNT ECON COMM	1973	20	52
ECOM	1972	17	50
BMI	1969	20	32
RAND	1968	NA	25
McNamara	1965	NA	25

The results of these aggregated studies show a large range of average net savings, varying from over fifty percent to twelve percent. By their very nature, these prior studies are not directly applicable to a specific weapon system acquisition. They are relevant in that they empirically demonstrate that savings due to competition have been realized on prior programs.

A review of 45 individual programs using a common analytic framework indicates that potential savings are unique for each particular program. The common framework used cost improvement curves to assess the impact of competition on contractor cost behavior. The results, shown in Table 3-2, reflect calculation of percent savings based upon remaining production quantities. Percent savings represent the difference between projected single source costs and realized competitive costs. Costs incurred prior to competition were considered as sunk costs.

TABLE 3-2
PRODUCTION COST SAVINGS FROM COMPETING
PREVIOUSLY SOLE SOURCE CONTRACTS

Programs	Savings (%)	Programs	Saving (%)
AN/APM-123	67.7	USM-181 Telephone Test Set	36.3
MK-980/PPS-5	66.5	Standard Missile, ER RIM 67A	34.0
AN/ARC-54	63.1	AN/SGS 23 208A Transducer	32.3
MK-48 Torpedo - Test Set	61.8	Tow Launcher	30.2
MK-48 Torpedo - Exploder	61.2	TD-660 Multiplexer	28.4
AN/GRC-103	60.1	BULLPUP 12B Missile	26.5
Standard Missile, MR RIM 66A	59.2	APX72 Airborne Transponder	23.3
AN/ARA-63 Radio Receiver	57.9	FAAR TADDS	18.2
TD-352 Multiplexer	55.6	FAAR Radar	16.6
60-6402 Electric Control	52.7	TOW Missile	12.3
MD-522 Modulator-Demodulator	51.9	Dragon Tracker	12.3
Hawk Motor Metal Parts	49.9	UPM-98 Test Set	11.5
MK-48 Torpedo - Warhead	48.6	AN/ASN-43	10.7
MK-48 Torpedo - Electric Assembly	47.0	SPA-25 Radar Indicator	10.7
CV-1548 Signal Converter	45.4	SHILLELAGH	9.4
AN/FYC-8X	43.2	Dragon Round	2.8
TD-204 Cable Combiner	42.0	Sidewinder AIM-9D/G	.7
AN/PRC-77 Radio	41.9	PP-4763/GRC Power Assembly	.5
AN/GRC-106	41.8	SPA-66 Radar Indicator	-3.4
TD-202 Radio Combiner	40.2	Rockeye Bomb	-4.5
FGC-20 Teletype Set	39.9	Sidewinder AIM-9B	-5.6
TALOS Missile	39.8	AN/ARC-131 Radio	-16.1

AVERAGE PRODUCTION COST SAVINGS FOR 45 PROGRAMS: 33%

The average savings of 33 percent, demonstrated by the 45 programs, is within the range of the prior studies. An assessment of the impact of competition cannot be made based upon one case. The exact percent savings associated with a particular program can be questioned based upon data availability and detail, however, the overall trend is clear. The review demonstrates that there are potential cost benefits associated with competition and that these potential benefits are determined by program specific characteristics.

Expressing savings as a percent of total program recurring costs for the same programs results in an average savings of 16 percent. These results demonstrate the large discrepancy that may arise strictly from employing different techniques in estimating potential savings due to competition.

Both estimating techniques were based upon changing cost behavior due to competition as evidenced by contractor cost improvement curves. Detailed unit cost analysis of prior competitive missile programs* has demonstrated that competition results in :

- An instantaneous reduction in the original producer's unit cost, evidenced by a downward shift in the producer's cost improvement curve
- A steepening of the original producer's unit cost improvement curve, evidenced by a rotation of the producer's cost improvement curve
- A lower first unit cost for the second producer

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*Cox, L. et at, "Analyses to Support Evaluation of the Potential Benefits of Competition in Cruise Missile Production," TASC, Technical Report TR-3313, 15 March 1981.

- A steeper initial cost improvement rate for the second producer.

These impacts can be graphically presented as shown in Figure 3-1.

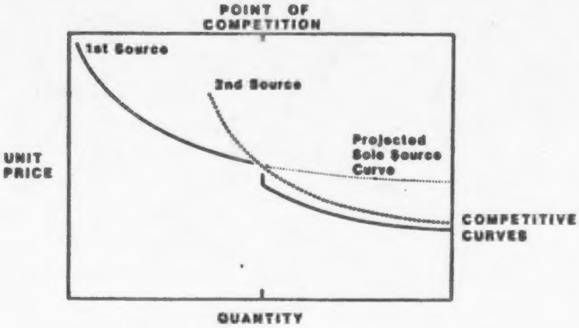

Figure 3-1 The Impact of Competition

Table 3-3 presents empirical evidence of second source behavior on prior tactical missile programs.

TABLE 3-3

THE IMPACT OF COMPETITION:
SECOND SOURCE COST BEHAVIOR

	Cost Improvement Rates			
Program	First Source	Second Source	Difference (%)	% First Unit Cost Reduction
SPARROW	.87	.84	3	14
BULLPUP	.82	.80	2	46
TOW	.98	.89	9	20
SIDEWINDER AIM 9B	.90	.83	8	17
SIDEWINDER AIM 9L	.91	.87	4	18
Average			5.2	23

In addition, similar behavior has been observed on other types of systems such as electronics and ships. The empirical data suggests a relationship between the cost and complexity of a system and the nature of the cost improvement curve of a second source. For less costly and complex systems, a second source can be competitive from the outset. As cost and complexity increase, more time is required for a second source to be competitive. Furthermore, in all cases where there was sufficient data to permit analysis, the slope of the cost improvement curve of the second source was steeper than that of the original producer.* These relationships are shown graphically in Figure 3-2.

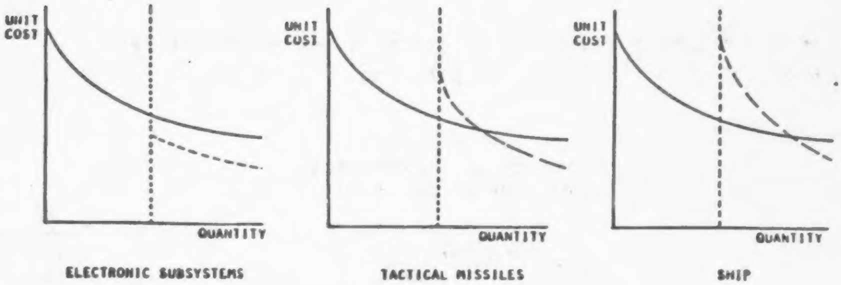

Figure 3-2 Comparison of First and Second Sources Cost Improvement Curves

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* Frederick Scherer observed similar behavior in his review of World War II Bombers. His analysis revealed that multiple source learning curves were approximately 4.4 percent steeper than single source curves. Scherer, The Weapons Acquisition Process: Economic Incentives. Cambridge, Mass., Harvard University Press, 1964.

This cost behavior of the second source applies competitive pressure to the original producer. His reaction to this pressure can be viewed as a shift and rotation of his cost improvement curve. Figure 3-3 graphically portrays this behavior using a log-linear formation of the cost improvement curve. The figure has been enlarged to dramatize the effects of competition on the original producer's unit costs. Figure 3-4 presents the actual behavior of Raytheon during the Production Phase of SPARROW.

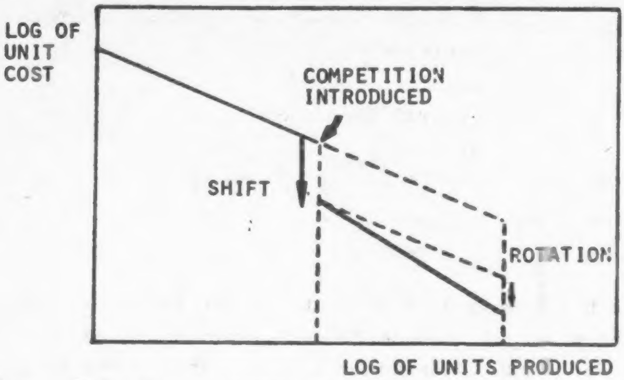
LOG OF UNIT COST
COMPETITION INTRODUCED
SHIFT
ROTATION
LOG OF UNITS PRODUCED

Figure 3-3 First Source Reaction to Competitive Pressure

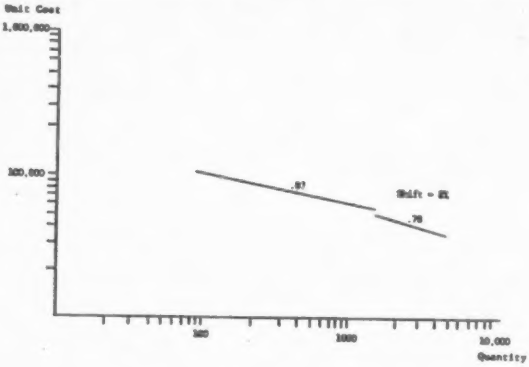

Figure 3-4 SPARROW Cost Improvement Curve - Raytheon

Table 3-4 presents observed shifts and rotations on prior missile programs.

TABLE 3-4

OBSERVED SHIFTS AND ROTATIONS
ON PRIOR MISSILE PROGRAMS

Program	Contractor	Shift (%)	Rotation (%)
SPARROW	Raytheon	8	10
BULLPUP	Martin	14	13
SIDEWINDER AIM 9B	General Electric	9	16
TOW	Hughes	15	32
SIDEWINDER AIM 9L	Raytheon	10	7

The historical data demonstrate the impact of competition on the original producer's cost improvement curve. The data also reveal that the magnitude of the shifts and rotations vary significantly. The concept of a "best competitive" cost improvement curve was developed to explain this variation, as shown in Figure 3-5.

Figure 3-5 Best Competitive Curve

This curve represents the continuous cost improvement curve which begins with the historically derived, non-competitive first unit cost and achieves parity with the last competitive unit cost. It represents what "might" have happened had the original producer been under continuous competitive pressure from the outset.

Comparing the slope of the hypothetical "best competitive" curve with the slope of the historical single source curve reveals a statistically significant relationship displayed in Figure 3-6.

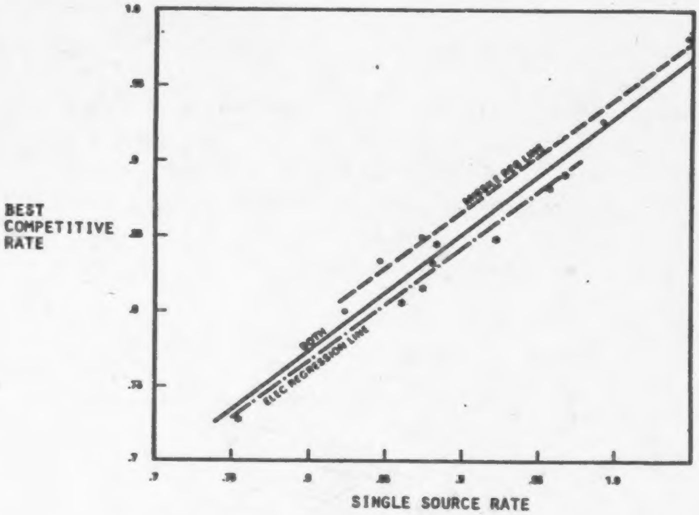

Figure 3-6 Correlation Between "Best Competitive" and Single Source Curves

The "best competitive" curve provides a consistent explanation of the observed cost behavior of the original producers. The observed shifts and rotations (of varying magnitudes) of the original producer's cost improvement curve can be characterized as "making up" for earlier cost improvements which were possible, but were unrealized in the absence of competition. Furthermore, the slopes of the hypothetical "best competitive" curves correspond well with the slopes of the competitive second source curves. In other words, the second producer, who is attempting to be competitive from the outset, follows a (historically derived) cost improvement curve very similar to the "best competitive" cost improvement curve calculated for the original producer. In addition, unit costs for the flatter portions of both curves are comparable.

Combining the empirically observed impact of production competition with the production cost surface results in a predictive methodology that incorporates consideration of competition, total quantity and production rate. This methodology, graphically displayed in Figure 3-7, can be used to assess alternative acquisition approaches for future production programs.

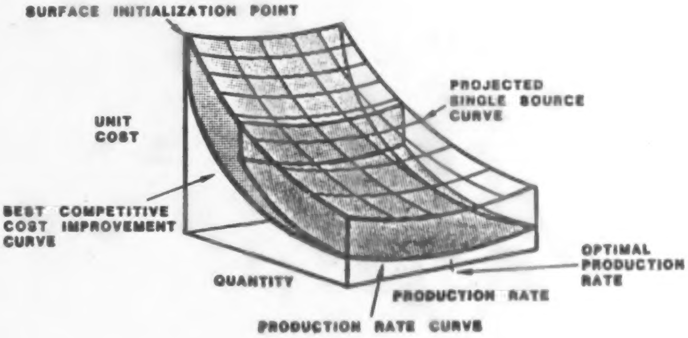
SURFACE INITIALIZATION POINT
PROJECTED SINGLE SOURCE CURVE
UNIT COST
BEST COMPETITIVE COST IMPROVEMENT CURVE
OPTIMAL PRODUCTION RATE
QUANTITY
PRODUCTION RATE
PRODUCTION RATE CURVE

Figure 3-7 The Integrated CIPC Model

4. COST GROWTH AND COMPETITION

Cost growth, as measured by actual costs compared to a baseline cost estimate, is a continous problem for most major weapon systems. Norman Augustine, Chairman, The Defense Science Board, reported that he has evidence that shows (after eliminating the effects of inflation and after adjustment for changes in procurement quantity):*

- The chances of a major program being completed within its initial cost estimate is about nine percent
- The chances of a major program being completed with no more than a 50% cost overrun is no more than about 70%
- The median overrun is about 32%
- The average overrun is nearly 52%.

TASC has examined the subject of cost growth and how it varies for competitive versus non-competitive programs for programs which submit Selected Acquisition Reports (SARs). Data for the analysis were obtained from the SAR Program Acquisition Cost Summaries spanning the period December 1975 through June 1981.

For each program, for each year, a cost-growth ratio was calculated based upon the current program cost estimate adjusted for quantity changes, divided by the development estimate (all using program base-year dollars). Thus, the cost-growth ratios are adjusted both for inflation and for quantity changes. The cost-growth profiles obtained were separated according to phase of the acquisition process, i.e., FSD or Production (very few programs appear in the SAR Cost Summaries prior to FSD). For those programs with cost-growth profiles extending into the production phase, the cost-growth ratios were re-normalized according to the program cost estimate at the start of production.

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* Augustine, Norman, "Just How Good/Bad to the Defense Acquisition Process", Government Executive, Vol. 14, No.2, February 1982, pp. 2734.

For example, consider the SIDEWINDER AIM-9L. Its cost-growth profile during the period spanned by the data is presented in Table 4-1. The growth is estimated total program costs during FSD was 89.8%, and the additional cost growth during the first three years of production was 19.0%.

TABLE 4-1

TOTAL PROGRAM COST COST GROWTH PROFILE
FOR SIDEWINDER AIM-9L

Year	Cost-Growth Ratio	FSD Period	Production Period
1975	1.741	DSARC II + 4 yrs -- 1.741	
1976	1.898	+ 5 yrs -- 1.898	DSARC III -- 1.0
1977	1.952		+1 1.028
1978	2.066		+2 1.089
1979	2.258		+3 1.190

Table 4-2 displays the growth in total program cost estimates during FSD for the programs included in the SAR data. Table 4-3 displays the additional cost growth during production for the same programs.

TABLE 4-2
TOTAL PROGRAM COST GROWTH DURING FSD

NON-COMPETITIVE FSD		COMPETITIVE FSD	
PROGRAM	COST GROWTH (%)	PROGRAM	COST GROWTH (%)
Sidewinder AIM-9L	89.8	UH-60A (Black Hawk)	-8.5
SPARROW AIM-7F	38.2	ALCM	14.4
Patriot	20.8	DIVAD Gun	0.2
M-1	80.5		
Roland	55.2	Average	2.0
Copperhead	21.7		
M-198	38.4		
Hellfire	54.0		
CH-47 Mod	12.5		
B-1	12.2		
F-16	26.8		
E-4	52.0		
EF-111A	60.0		
AEGIS	27.8		
Captor	87.7		
Condor	29.5		
Harpoon	12.8		
Trident	6.5		
PHM	20.1		
F-18	58.2		
Average	40.2		

TABLE 4-3
TOTAL PROGRAM COST GROWTH DURING PRODUCTION

NON COMPETITIVE PRODUCTION		COMPETITIVE PRODUCTION	
PROGRAM	COST GROWTH (%)	PROGRAM	COST GROWTH (%)
UH-60A (Black Hawk)	22.5	SIDEWINDER AIM-9L	19.0
M-198	-16.0	SPARROW AIM-7F	9.4
F-16	22.4	SSN-688	-3.6
E-3A	5.3	FFG-7	13.8
Captor	38.0		
Harpoon	25.2	Average	9.65
Trident	5.8		
PHM	-1.3		
Average	12.7		

Although the quantity of data in each category is too limited to obtain statistical confidence, the implications are clear. As shown, a significant portion of the growth in total program cost estimates occurs during FSD. Furthermore, the presence of competitive pressure during Full Scale Development greatly reduces cost growth compared to a non-competitive environment. Competition during production also appears to suppress cost growth, but not as dramatically as competition during FSD. None of the programs in the data sample maintained competition during both FSD and production.

Historical evidence indicates that competition is an effective means of suppressing cost growth. Additional funds are required to maintain competitive pressure, and the program office must assume additional managerial responsibilities. For many programs, these additional costs may be justified solely on the basis of suppressing future cost growth.

THE SECRETARY OF DEFENSE
WASHINGTON, THE DISTRICT OF COLUMBIA

9 SEP 1982

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARIES OF DEFENSE
ASSISTANT SECRETARIES OF DEFENSE
GENERAL COUNSEL
ASSISTANTS TO THE SECRETARY OF DEFENSE
DIRECTORS OF THE DEFENSE AGENCIES
DIRECTORS, OSD FIELD ACTIVITIES

SUBJECT: Competitive Procurement

I am convinced that we must give greater attention to obtaining competition in the placement of contracts by all Department of Defense components. The benefits derived from competition are well recognized. Competition serves to reduce cost, improve quality, and enhance the industrial base that is so critical to defense mobilization. The policy to obtain maximum competition is prescribed by the Armed Services Procurement Act, and it is reiterated by Executive Order 12352 and at various points in the Defense Acquisition Regulation. It is our responsibility to assure that this policy is adhered to rigorously. This responsibility was stressed by the Deputy Secretary in his memorandum to you dated July 27, 1981, in which he advised that he had added an initiative on increasing competition to those already being addressed by the Acquisition Improvement Task Force. Because of the importance I place on competition, and because more progress can and must be made, I now reiterate that guidance.

The Department of Defense components are to place maximum emphasis on competitive procurement. All personnel involved in the acquisition process from the first identification of the requirement through the execution of the purchase should recognize this responsibility. Contracts will be placed on other than a competitive basis only when clearly justified.

No type of purchase is automatically excluded from this direction to maximize competition and this direction applies regardless of the level of the requesting official or the importance of the subject matter of the contract. Particular attention should be given to those areas where the assumption traditionally has been made that competition is not available. Department of Defense components should plan acquisition schedules to allow adequate time for the competitive procurement process. When competition can not be obtained, the reasons should be fully and carefully documented in accordance with our acquisition regulations.

Fulfillment of this objective to increase competition requires a commitment on the part of all Department of Defense personnel who are involved in the acquisition process. It is our responsibility to develop and maintain this commitment. I ask that you give this matter the high level of attention that I believe is required if we are to make progress.

Caspar W. Weinberger

WASHINGTON, D.C. 20301

JUL 27 1981

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARIES OF DEFENSE
ASSISTANT SECRETARIES OF DEFENSE
GENERAL COUNSEL
ASSISTANTS TO THE SECRETARY OF DEFENSE
DIRECTORS OF THE DEFENSE AGENCIES

SUBJECT: Increasing Competition in the Acquisition Process

The value of competition in the acquisition process is one of our most widely accepted concepts. We believe that it reduces the costs of needed supplies and services, improves contractor performance, helps to combat rising costs, increases the industrial base, and ensures fairness of opportunity for award of government contracts. Despite our beliefs and efforts at furthering competition, there is a serious concern that our achievements are not adequate. Many in government and industry believe that we award too many contracts without adequate competition.

I am therefore asking that managers at all levels renew their efforts to obtain maximum competition for their contractual requirements. I have directed that my memorandum dated April 30, 1981, on "Improving the Acquisition Process" be amended to add a recommendation on competition. A copy of that recommendation is attached. It will receive the same intensive implementation and follow-up attention as the earlier recommendations.

Achievement of competition in acquisition crosses many functional areas: procurement, program management, engineering, financial management, legal, supply, maintenance, and others. For this reason, individuals who have responsibility for coordinating these disciplines must become personally involved to ensure that appropriate plans and procedures are followed.

I request that each Military Department and Defense Agency having procurement authority establish management objectives for the enhancement of competition. Please send your plans for this program to the Under Secretary of Defense for Research and Engineering within 60 days of the date of this letter.

Frank C. Carlucci

Frank C. Carlucci

Attachment

Recommendation 32

INCREASE COMPETITION IN THE ACQUISITION PROCESS

Competition is a basic cornerstone of the free enterprise system. When applied to procurement, it assures fairness, avoids favoritism, obtains lower prices, and achieves better performance. Failure to obtain competition for Government contracts results not only in a loss of these benefits but in a loss of confidence in the integrity and quality of the acquisition process. Such losses have a very serious effect on the ability of the DoD to accomplish its basic mission.

Competition can be obtained only by meticulous planning and by the support of management at all levels. It involves all functional disciplines associated with the acquisition process -- not just the procurement or contracting function. Special techniques for enhancing competition have been developed for different commodities and services. Some require additional early funding to achieve significant savings in later phases. Technical or design competition may supercede price considerations during advanced or engineering development phases for new equipment. Competition should be extended to the extent possible beyond initial acquisition and should include life cycle costs.

Recommendation - Require the Services and Defense Agencies to establish management programs to increase competition by setting objectives.

Advantages - Will decrease contract costs, improve performance, avoid the appearance of favoritism, and increase confidence in Defense procurement.

Disadvantages - Increases management costs and lengthens preaward lead time.

Action Required - Direct that acquisition management activities establish appropriate program objectives to enhance competition.

Frank C. Carlucci
JUL 27 1981

Approved: ______
Idea Needs More Development: ______
I Need More Information: ______
Disapproved:

Senator **Levin**. The committee is adjourned.

[Whereupon, at 12:34 p.m., the committee adjourned, to reconvene at 2 p.m., Thursday, June 9, 1983.]

COMPETITION IN CONTRACTING ACT OF 1983

THURSDAY, JUNE 9, 1983

U.S. SENATE,
COMMITTEE ON ARMED SERVICES,
Washington, D.C.

The committee met in open session pursuant to adjournment at 2:25 p.m., in room SR-232A, Russell Senate Office Building, Senator John W. Warner, presiding.

Members present: Senators Warner, Cohen, Quayle, Nunn, and Levin.

Staff present: Alan R. Yuspeh, general counsel, Paul C. Besozzi, minority counsel; Louis W. Arny III and David S. Lyles, professional staff members; and Marie Chaillet, staff assistant.

Also present: Carol Weatherby, assistant to Senator Warner; Ron Kelly, assistant to Senator Humphrey; Hank Steenstra, assistant to Senator Quayle; Ed McGaffigan, assistant to Senator Bingaman; Jeff Minsky, and Susan Collins, assistants to Senator Cohen; Greg Pallas, assistant to Senator Exon; Ralph White and Linda Gustitis, assistants to Senator Levin.

OPENING STATEMENT BY SENATOR JOHN W. WARNER, PRESIDING

Senator WARNER. On behalf of the acting chairman, Senator Cohen, who has been detained on the floor of the Senate, I extend apologies to the witnesses and others in attendance. The delay in this hearing was unavoidable. We will, however, now open the hearing.

This afternoon the Committee on Armed Services continues its hearings on S. 338, the Competition in Contracting Act. This is the second and final day of hearings which the committee will conduct on this proposed legislation. S. 338 has been favorably reported by the Committee on Governmental Affairs, and it is to be acted upon by the Armed Services Committee before June 30.

Today we will hear from two additional Government witnesses who will address the matter of the level at which certified cost and pricing data is to be required. We will then hear from Prof. John Cibinic, Jr., professor of law at George Washington University and an authority on Federal procurement. Finally, we will hear from two outside witnesses.

Our first witnesses this afternoon, who will appear as a panel, are Mr. Charles O. Starrett, Jr., Director of the Defense Contract Audit Agency, and Mr. Derek J. Vander Schaaf, Deputy Inspector General of the Department of Defense. I would ask that each of you make whatever statement you would like, and then we will have questions from the committee.

STATEMENT OF DEREK J. VANDER SCHAAF, DEPUTY INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE

Mr. VANDER SCHAAF. Thank you, Senator.

It is a pleasure to be here. It is the first opportunity for the newly created Office of the Inspector General to appear before the committee. I want to take the opportunity to thank you and Senator Levin and other members of the committee for the support you have rendered in seeing to it that there has been established an Office of the Inspector General.

I am pleased to testify today on the certification threshold for defective pricing reviews in DOD contracts. Public Law 97-86 raised the $100,000 threshold for contractors' submissions of certified cost or pricing data to $500,000.

The Office of the Inspector General supports an amendment that would return the threshold to $100,000. The Defense Contract Audit Agency reported savings of $160 million in fiscal year 1981 from audits of firm fixed-price proposals under $500,000. Similar savings were reported on reviews of fixed price incentive proposals under $500,000. These savings were achieved by spending between $7 and $8 million in audit resources, meaning about $20 was saved for every $1 of audit effort.

Several reasons have been offered to the committee for not restoring the $100,000 threshold. The Office of the Inspector General does not agree with them.

First, we believe it would add no administrative effort to DOD and very little effort for contractors. We doubt that any competent contracting officer would negotiate a deal over $100,000 without requesting cost or pricing data.

Thus, we believe there was no real reduction in the contractors' paperwork burden by raising the threshold. Restoring the threshold to $100,000 will make contractors more inclined to submit accurate, complete and current pricing proposals since their contracts would be subject to price adjustments under the provisions of the Truth in Negotiations Act.

Second, keeping the $500,000 threshold instead of restoring $100,000 does not insure better use of our limited number of auditors. DOD would not be required to audit all contracts under $500,000, but could base its audits on problem contractors or those that have a pattern of poor pricing practices.

In particular, if a large contract is shown to have defective pricing, auditors could be deployed to examine the cost and pricing data for contracts between $100,000 and $500,000 from the same contractor. There would obviously be a good potential for additional dollar recoveries.

Third, it is often argued that increasing the certification threshold to $500,000 was a great benefit to small business. Often, these firms do not have the experience in Government contracting that many of the larger prime contractors have.

Many of these small businesses do not have sophisticated cost, schedule, and control systems that auditors and contract administrators update at regular intervals and check for authenticity. They often lack an approved cost estimating and accounting system.

Thus, in my opinion the use of the Truth in Negotiations Act certification is a necessary protection for the Government in dealing with small business firms whose contracts exceed the certification threshold.

While it is possible to recover funds or obtain a price adjustment on contracts which do not have a certification, it is difficult and usually must be accomplished under the False Claims Act. Thus, having a certificate of cost and pricing data helps to avoid the expense of litigation.

Finally, we do not agree that certification is unnecessary from a contractor that has repetitive DOD business. If the business is repetitive, it should be that much easier for the contractor to certify with assurance that his prices are current, complete, and accurate.

Certain conditions of repetitive contracts might easily change, such as labor rates and subcontractor identities and pricing. We do not believe that certification significantly increases the contractor's burden in the case of repetitive business, but certification could very well result in substantial sums being recovered for the Government or not spent in the first place.

In other words, the certification process has a prevention aspect to it.

Mr. Chairman, the Office of the Inspector General and its predecessor, Office of the Assistant to the Secretary for Review and Oversight, previously opposed raising the certification threshold and now supports lowering it to $100,000 on fixed-price contracts. Cost and pricing certification is an important tool in the arsenal of the auditor and contracting officer to insure fairness in contractors' dealings with DOD.

I have a statement which I presented to the Committee on Governmental Affairs recently. I would like to place that statement in the record if it is all right with you.

Senator WARNER. It will be accepted.

[The prepared statement of Derek J. Vander Schaaf follows:]

PREPARED STATEMENT BY DEREK J. VANDER SCHAAF, ACTING DEPUTY INSPECTOR GENERAL, DEPARTMENT OF DEFENSE ON DEFECTIVE PRICING REVIEWS

Mr. Chairman and members of the committee: I am pleased to testify today on defective pricing in Department of Defense (DoD) contracts. I have served as the Principal Deputy Assistant to the Secretary of Defense (Review and Oversight) for the past year, and I share many of your concerns about defective pricing and its impact on the American taxpayers. I shall provide my views on several areas identified by the Committee staff and suggest a few changes that I believe could benefit us all. Before I address specific issues, however, I would like to explain what the Office of the Assistant to the Secretary for Review and Oversight and its successor, the Office of the Inspector General, have done in the defective pricing area.

CONTRACT AUDIT FOLLOWUP

When the Office of the Assistant to the Secretary of Defense (Review and Oversight) was created, one of the Secretary's primary concerns was audit followup. After several years of effort, the Department, in January 1981, isued policy for following up on General Accounting Office and internal audit reports, but still had not issued policy for following up on contract audits. Developing contract audit followup policy was one of our highest priorities. We worked on this beginning in May 1981 and on August 31, 1981, DoD issued Directive 5000.42, "Policy for Followup on Contract Audit Recommendations." This was only months after the Review and Oversight Office was established.

DoD Directive 7640.2 (formerly 5000.42) delineates policy for the timely resolution and disposition of significant contract audit reports. The Directive requires that DoD components track and report on the statute of certain post-award audits, including all defective pricing reports, from the date of receipt through final disposition. If the contracting officer disagrees in the auditor's recommendation for a downward price adjustment due to alleged defective pricing, the Directive requires that the disagreement be brought promptly to the attention of a designated independent senior acquisition official or board for review. The Services and DLA have designated different individuals or boards at each procurement and contract administration activity. The review official or board is required to provide to the contracting officer a clear, written recommendation concerning the issue in question. A copy must be sent to the contract auditor. The Directive also requires that the contracting officer provide written feedback to the auditor on the final disposition of the audit report.

I am responsible for seeing that Directive 7640.2 is successfully implemented. My office monitors the status reports from the Military Departments and Defense Agencies, evaluates performance, develops policy and provides guidance to DoD components where needed.

CHART 1.—OVERAGED CONTRACT AUDIT REPORTS 6 MO. ENDED SEPT. 30, 1982

	Open as of Apr. 1, 1982	Open as of Sept. 30, 1982 [1]	Closed during period [1]
Number of reports:			
Army	51	58	26
Navy	157	193	39
Air Force	129	129	48
DLA	220	201	83
Total	557	581	196
Questioned costs (thousands):			
Army	$120,667	$95,827	$58,858
Navy	174,741	270,954	18,027
Air Force	559,483	614,018	136,643
DLA	239,981	303,326	52,345
Total	1,094,872	1,284,125	265,873

[1] Navy data cover the period from Apr. 1, 1982, through Aug. 31, 1982.

The most recent contract audit followup status report covered the six month period ending September 30, 1982. Chart 1 summarizes the components' overall performance during the reporting period. There were 557 audit reports more than six months old at the start of the period. They involved questioned costs of $1.1 billion. During the reporting period, DOD components closed 196 of these reports involving about $266 million in questioned costs. An additional 220 reports became overaged during the reporting period. As a result, the number of reports over six months old increased to 581, with total questioned costs of about $1.3 billion. About 10 percent of these reports (56) are being litigated before the Armed Services Board of Contract Appeals or the Court of Claims.

CHART 2.—OVERAGED CONTRACT AUDIT REPORTS AS OF SEPT. 30, 1982

Type of report	Number of reports	Percent of total	Questioned costs (thousands)	Percent of total
Cost accounting standards	124	21	$152,480	12
Defective pricing	145	25	210,196	16
Incurred costs	57	10	297,381	23
Indirect cost rates	129	22	397,466	31
Operations audits/internal control reviews	61	10	108,907	8
Estimating system surveys	9	2	7,806	1
Claims proposals	30	5	73,202	6
Terminations	0	0	0	0
Others	26	5	36,687	3
Total	581	100	1,284,125	100

Chart 2 shows more information on the September 30, 1982 reporting period. It includes the number of reports and related costs questioned for audit reports more than six months old by type of report. Although defective pricing reports account for only about 3 percent of the total number of contract audit reports performed each year, the chart shows that they accounted for about 25 percent of the total number of open reports over six months old and about 16 percent of questioned costs. And, my office has found they are often especially difficult to close out.

CHART 3.—OVERAGED CONTRACT AUDIT REPORTS AS OF SEPT. 30, 1982

Component	Number of reports by year report issued										
	1973	1974	1975	1976	1977	1978	1979	1980	1981	1982	Total
Army	0	0	0	0	0	1	4	15	27	11	58
Navy	0	1	0	1	0	8	20	70	82	11	193
Air Force	1	0	1	1	2	3	11	27	53	30	129
DLA	0	0	0	0	4	7	11	54	95	30	201
Total	1	1	1	2	6	19	46	166	257	82	581
Percentage		1			1	3	8	29	44	14	100

INCREASE/(DECREASE) FROM MAR. 31, 1982

Component	1973	1974	1975	1976	1977	1978	1979	1980	1981	1982	Total
Army	0	0	0	0	0	(3)	(1)	(5)	5	11	7
Navy	0	0	(1)	(2)	(1)	(4)	(4)	11	26	11	36
Air Force	0	0	0	1	(1)	(2)	(8)	(24)	4	30	0
DLA	0	(1)	0	(1)	0	(3)	(11)	(26)	(7)	30	(19)
Total	0	(1)	(1)	(2)	(2)	(12)	(24)	(44)	28	82	24

Our followup efforts to date have focused primarily on the development of DOD Directive 7640.2 and the prompt disposition of audit reports issued before 1980. Chart 3 shows the number of overaged reports by year of issue and component. It also shows the increase or decrease by year and component between March 31, 1982 and September 30, 1982. The components made considerable progress in closing out older audit reports during the period. Although the total number of overaged reports increased by 24, the number of overaged reports issued prior to 1981 decreased by 85.

Many of these older reports were defective pricing cases. We requested and received from the Military Departments and the Defense Logistics Agency (DLA) explanations of the causes for delays in disposing of these reports and definitive action plans for their final disposition. Since we began emphasizing the closure of these older reports, several defective pricing reports were dispositioned resulting in contract price adjustments and recoveries of funds due the Government.

In response to one of our followup inquiries, one major DOD procurement activity recently reported that a 1979 defective pricing case was settled as part of negotiations for a fiscal year 1982 production contract on the same program. My office immediately expressed concern that closing defective pricing cases in this manner may not result in an equitable adjustment between contracts and makes it difficult, if not impossible, to track and account for defective pricing recommendations. A few days later, we advised the Military Department of our intent to review the closure of the audit report in question. Shortly afterwards the contracting officer and the contractor negotiated a downward price adjustment of the original (1973) contract. Restitution was made in the form of a check for $40,000 from the contractor to the Government.

More recently, one of my staff members visited another major procurement activity to review the negotiated settlement of five defective pricing cases at one contractor location. We found that the settlement did not result in downward price adjustments to the original contracts. Instead the settlement requires that the contractor provide future goods or services valued at $2 million on a current production contract with no increase in contract price. The settlement not only involves transfers of funds between contracts and fiscal years, but also involves transfers between governments, since one of the defective pricing cases occurred on a foreign military sales contract.

I am consulting with the acquisition community on this practice. I think it would be best to discontinue the practice of settling defective pricing cases against other contracts immediately. The practice could result in shifting appropriations to another purpose and another program year as a result of the overpricing of earlier contracts. It could also provide an incentive to contracting officers to settle for less than the full amount of the recommended price adjustment in order to advance certain programs. In other words, the contracting officer may be tempted to sacrifice the Government's overall interests in order to make him or herself look good by benefiting his or her assigned program.

The followup status reports and our field trips show that, prior to DOD Directives 5000.42 and 7640.2, the disposition of defective pricing reports was a relatively low priority for contractors, contracting officers and auditors. For obvious reasons, contractors were rarely anxious to settle defective pricing cases. The contracting officers considered them low priority because they were frequently under considerable pressure to complete negotiations on major procurements or contract closeouts. Unlike many other contract audits, defective pricing cases did not have to be negotiated by specific due dates. Therefore, they were the assignments that were most often postponed.

Funding may have been another consideration. The negotiation of major procurements involved current funds, while defective pricing cases normally involved prior year funds. Putting it another way, cost savings from negotiated procurements directly benefited the program office by providing additional funds for existing programs. Defective pricing recoveries, on the other hand, benefited the U.S. Treasury but provided no monetary benefits to the program office responsible for its settlement.

Perhaps another explanation for the low priority assigned to defective pricing cases is the natural tendency by the contracting officer to view the auditor's report as a negative reflection on his performance as well as the contractor's. Some contracting officers may be defensive about the defective pricing issues raised by some audit reports.

DCAA has also assigned a low priority to defective pricing reviews. In 1972, DCAA established a policy that each audit office would spend at least 2 percent of its direct audit effort in the performance of defective pricing reviews. In 1979, DCAA dropped the minimum performance requirement and substituted a priority plan. Each office must now assign first priority to demand audits and second priority to defective pricing reviews. Although second priority may sound impressive, defective pricing reviews are actually far down the list because demand audits include all requests for audits from acquisition officials which must be completed within a specific timeframe such as bid and proposal reviews, equitable adjustments, terminations, progress payments, etc. DCAA recently spent about 3 percent of its total audit efforts on defective pricing reviews, so there has been little increase.

DCAA has assigned to defective pricing reviews priority that is commensurate with the payback to the Government they anticipate from performing such reviews. I believe that if defective pricing reviews were afforded the attention they deserve from contracting officers and auditors, their payback would warrant a higher audit priority. Therefore, I believe DCAA should devote more of its resources to defective pricing reviews. My initial thought is that DCAA should spend about 5 to 7 percent of its audit efforts in defective pricing reviews. The Inspector General's office, which now has responsibility for policy and oversight of DCAA will review the controls and methods DCAA uses in determining the number of defective pricing reviews. After we complete our analysis, the Office of the Inspector General will make recommendations for changes in frequency of defective pricing audits. Of course, Mr. Chairman, you realize that the OIG was recently organized. The Department went through extensive debate on who is responsible for contract audit policy. OIG has that responsibility, and the matter is now settled.

CONTRACT AUDIT OVERSIGHT AND POLICY

My office's responsibilities also include the oversight and evaluation of DCAA audit activities and the issuance of contract audit policy. My staff is currently reviewing all defective pricing reports issued by DCAA during the six month period ending June 30, 1982. This review is limited to cases of over $1 million. We will also be sampling some of the defective pricing audits done by DCAA which did not disclose defective pricing. We want to determine the adequacy, sufficiency, scope and reporting by DCAA for defective pricing audits. Our staff will be alert for circumstances that warrant referral to my criminal investigative organizations.

Another current contract audit oversight effort is a review of the quality and timeliness of contract and internal audits of subcontractors' price proposals. As part of this review, we observed deficiencies in the multiyear procurement for 294 UH-60A helicopters. The major deficiency found was that the prime contractor's price proposal was not fully documented with respect to subcontractors' cost or pricing data. There was no indication that the contracting officer had other current cost or pricing data available on which to evaluate the subcontractors' pricing proposals. He determined that the Government was receiving a better price on a cost per helicopter basis. However, he had no assurance it was the best price without certain subcontractor cost and pricing data. Instead of waiting for this data, the contracting officer assumed that the prime would be able to negotiate lower prices with his subcontractors. After the prime contractor completed negotiations with the Government, the prime contractor was able to negotiate substantially lower prices with their subcontractors. We recommended that DCAA perform a defective pricing review on all major subcontractors. We also asked DCAA to review prior UH-60A helicopter procurement for defective pricing.

VARIANCE BETWEEN RECOMMENDED AND SUSTAINED PRICE ADJUSTMENTS

There are many reasons for the variance between recommended and sustained price adjustments reported in DCAA's Management Information System.

In some cases, auditors are able to develop very strong support for defective pricing allegations. In others, auditors may have strong indication that defective pricing took place, but very little actual support for their positions. The auditor must express an opinion as to whether or not defective pricing may have taken place during negotiations, and provide the best available support for his opinion. The contracting officer may or may not agree with the auditor's position. For example, the defective pricing the auditor identified may have already been addressed in contract negotiations to which the auditor was not privy.

The contracting officer must frequently negotiate a fair and equitable settlement with contractor officials. This process often results in significant variances between amounts recommended by auditors and sustained by contracting officials. Errors or omissions by the auditor or contracting officer may play little or no part in these cases.

Performance reports submitted by DCAA to my office in 1982 indicate that only a small proportion of the questioned amount is actually sustained. I believe that the variance is too high. As I said earlier, defective pricing has historically been afforded a low priority by auditors and contracting officers. In many cases, the responsible parties failed to make serious attempts to reach a settlement for months or years. As a result, the auditors or other technical experts were no longer available to testify. This diminished the Government's ability to litigate such cases successfully. The contracting officers often felt compelled to negotiate settlements rather than take their cases to court.

The DOD components are now developing implementing instructions for DOD Directive 7640.2. As full implementation takes place, I expect to see an increase in the overall rate of sustention for defective pricing recommendations. I will closely monitor the Department's progress in this area, and continue to search for ways to reduce the gap between recommended and sustained amounts.

PRICE NEGOTIATION MEMORANDA

DAR 3-811, Record of Price Negotiation, requires that the contracting officer prepare a record of the basis for determining price in sufficient detail to show the principal considerations the parties made during negotiations. The existence of a well prepared price negotiation memorandum (PNM) is crucial to the strength of the Government's position in most defective pricing cases. Without a well prepared PNM, the Government is most susceptible to being faulted by the courts as being too speculative as to the causes of overpricing.

Now that Directive 7640.2 has been issued, the PNM serves a dual function. It remains important as a supporting document for defective pricing allegations. It also serves as a record of the resolution of any differences of opinions which may have developed between the auditor and the contracting officer as a result of the auditor's report. The PNM documents the final disposition of the auditor's recommendations, and provides feedback to the auditors for audit planning purposes. The auditors may wish to redirect their future efforts based on the results of prior audit recommendations.

If the contract auditor fails to receive a PNM within a reasonable timeframe following negotiations, the auditor should contact the report recipient to determine why. If the report recipient fails to provide a satisfactory response, the auditor should elevate the problem up the chain of command.

One problem for DCAA is that the auditor frequently has no way of knowing when negotiations are held or completed. Even when the auditor is invited to attend negotiations, he/she rarely attends the negotiations from beginning to end. Usually the auditor is invited to provide technical input on only a portion of the elements to be negotiated. In addition, many of the auditors' pricing reports are never subjected to negotiations because the contractor's bid is revised or withdrawn by the contractor or eventually rejected by the Government. Therefore, the auditor normally depends on the contracting officer to provide either a PNM or a notification of no action.

When the PNM is received by DCAA, the auditor is required by DOD Directive 7640.2 to review it for significant differences of opinion on matters raised in the audit which were not referred by the contracting officer for an independent review prior to negotiations. When such differences are found, the auditor is required to notify the contracting officer of the difference and recommend that similar differences be submitted for independent review in the future. The PNM is then retained for potential defective pricing review.

The responsibility for the timely and thorough preparation and distribution of PNMs clearly rests with the contracting officers. Members of my staff and internal audit reports from the Military Departments have indicated that performance in this area needs improvement. My staff will followup on the Military Departments' efforts to improve the development and distribution of PNMs and attempt to develop specific guidance where needed.

DEFECTIVE PRICING DISPOSITION MEMORANDUM

DAR 3-812, Disposition of Post Award Audits, requires that contracting officers prepare a memorandum for each defective pricing report indicating whether or not the auditor's allegations were upheld and the results of final actions taken on the auditor's recommendations. A copy of the memorandum is required to be forwarded to the auditor.

Contracting officers have historically taken several months or years to settle defective pricing cases. Therefore, auditors do not become overly concerned if the disposition memorandum is not received in a period of several years. Nevertheless, many DCAA offices send out reminders to report recipients asking for an update of the status of open reports. The Office of the Inspector General continues to push for settlement within six months unless the defective pricing audit goes to litigation. I do not believe that defective pricing cases should take years to resolve unless they are docketed as ASBCA cases and are outside of the contracting officer's control. I also plan to monitor the speed and accuracy with which disposition memorandums are distributed to auditors. I do not believe that the auditors should have to make repeated inquiries as to their status.

DOD Directive 7640.2 now requires that all defective pricing reports, without regard to amount, be tracked and reported by the Military Departments and Defense Agencies. The components' implementing instructions for this new requirement are due on April 28, 1983, and their first status reports are due on October 31, 1983.

CONTRACTS AWARDED WITHOUT DEFECTIVE PRICING CLAUSES OR CERTIFICATES

The awarding of a contract subject to Public Law 87-653 without a defective pricing clause does not necessarily negate the need for defective pricing review. If the contracting officer or auditor suspects that defective pricing data were relied upon by the Government to negotiate the contract price, a defective pricing review may be desirable. The failure to include the clause may preclude full recovery of the amount in question. Other means are available, however, for at least partial recovery.

If the contracting officer fails to obtain a certificate of current cost or pricing data at the time of negotiations, DCAA currently does not perform a defective review. I believe that defective pricing reviews should be performed in such cases, however, and I intend to issue new policy, or seek legislative or administrative remedies if necessary.

The Court of Claims has stated that "The duty to furnish accurate, complete, and current data is a duty imposed on Government contractors by a statute, and, therefore, that duty cannot be waived by a Government agent."

Government negotiators or contracting officers should not be able to avoid, either deliberately or through their negligence, the intent of statutory regulations.

The Justice Department takes the position that there can be civil fraud liability under the False Claims Act for any defective data even in the absence of a certificate.

PROBLEM CONTRACTORS

The contract audit followup status reports for the six month period ended September 30, 1982 include 145 defective pricing cases on contracts awarded to 45 separate contractors. These have been open for at least six months. A summary of the number of reports and total amounts questioned, detailing the top 10 contractors, follows.

Contractor/location	Number of reports	Total questioned
General Dynamics, Fort Worth, Tex	2	$52,912,000
Grumman Aerospace Corp., Bethpage, N.Y	32	29,574,000
McDonnell Douglas Corp., St. Louis, Mo	26	25,934,000
Pratt & Whitney Aircraft, East Hartford, Conn	3	22,631,000
Newport News Shipbuilding, Newport News, Va	2	9,993,000
Fairchild Republic, Farmingdale, N.Y	3	8,134,000
Chrysler Corp., Detroit, Mich	4	8,077,000
Lockheed, Marietta, Ga	6	7,513,000
Sperry Rand, Great Neck, N.Y	6	6,998,000
FMC Corp., Minneapolis, Minn	3	3,907,000
All others	58	32,070,000
Total	145	207,743,000

This list does not necessarily show contractors with historical problems in defective pricing. It merely shows where contracting officers are experiencing problems in disposing of defective pricing reports within six months of issuance. We have not initiated any actions based on the number of cases outstanding at specific contractor locations.

The contract audit followup status reports for six month period ended September 30, 1982, include five open defective pricing reports with recommended price adjustments in excess of $5 million. They are as follows:

Contractor/location	Contract No.	Dollar value
Grumman Aerospace Corp., Bethpage, N.Y	N00019-78-C-0014	$9,893,000
Newport News Shipbuilding, Newport News, Va	N00024-67-C-0325	9,486,000
Pratt & Whitney Aircraft, East Hartford, Conn	F33657-70-C-0600	21,350,000
Fairchild Republic, Farmingdale, N.Y	F33657-78-C-0135	6,471,000
General Dynamics, Fort Worth, Tex	F33657-75-C-0310	52,800,000

These defective pricing cases were reported as over six months old as of September 30, 1982. (Cases that are open for less than six months are not required to be reported.)

The following are defective pricing reports issued by DCAA during the six month period ended June 30, 1982 with recommended price adjustments in excess of $5 million.

Contractor/location	Contract No.	Dollar value
McDonnell Aircraft Co., St. Louis, Mo	F33657-79-C-0779	$14,414,655
Do	F33657-79-C-0779	13,344,107
Pratt & Whitney Aircraft, East Hartford, Conn	F33657-80-C-0218	15,327,765
Boeing Aerospace Co., Seattle, Wash	F19628-80-C-0007	12,826,000
Boeing Military Airplane, Wichita, Kans	F33657-79-C-0416	12,018,251
Do	F33657-79-C-0416	10,278,161
Newport News Shipbuilding, Newport News, Va	N00024-80-C-2023	11,848,302

At the present time, the Office of the Inspector General is not aware of other defective pricing cases over $5 million.

CERTIFICATION THRESHOLD

The DOD Authorization Act of 1982 (Public Law 97–86) raised the threshold for contractors' submissions of certified cost or pricing data to $500,000. The Under Secretary of Defense for Research and Engineering (USDR&E) supported the change in testimony on June 3, 1981 before the Legislation and National Security Subcommittee of the Committee on Government Operations. He believed that the thresholds set by the original law posed a burden on DOD resources and extended the lead time of the procurement process. The Defense Acquisition Regulations (DAR) was changed in late December 1981 to eliminate audits of proposals under $500,000.

The Assistant to the Secretary of Defense for Review and Oversight (Inspector General-designate) expressed concern about the proposed increase in certification threshold and auditing threshold in his memorandum to USDR&E dated January 4, 1982. He pointed out that DCAA reported cost savings of about $160 million from audits of firm fixed-price proposals under the $500,000 level during fiscal year 1981. DCAA reported similar savings experience in review of fixed-price incentive proposals under $500,000. These savings were achieved with the expenditure of between $7 and $8 million in audit resources (roughly $20 saved for every $1 of audit effort).

The Office of Inspector General believes that returning the threshold to $100,000 for contractor certification adds no administrative effort for DOD and very little effort for the contractors. Contractors will be inclined to submit accurate, complete and current proposals since any contract over $100,000 will be subject to price adjustment under the provisions of Public Law 87–653.

The Office of Inspector General believes that another advantage occurs when the contract auditor uncovers a poor condition in the contractor's estimating methods while doing other defective pricing reviews. The lower threshold will give the auditor the opportunity to look at contracts valued between $100,000 and $500,000 to determine if the same condition exists and to recommend the necessary contract adjustments. Without the certificate the auditor would not be allowed to pursue a contract price adjustment under Public Law 87–653. He would have to seek other more difficult means such as use of the False Claims Act.

MONETARY PENALTIES

Defective pricing involves the failure of a contractor to provide current, complete and accurate cost or pricing data. Most defective pricing violations do not constitute fraud. If the violation does constitute fraud, the False Claims Act provides the Government with criminal remedies. Violations can result in fines of up to $10,000 and imprisonment for up to five years.

As the Assistant to the Secretary of Defense (Review and Oversight) testified last year, if Congress enacted a Program Fraud Civil Penalties Act similar to the one introduced by Senator Roth (S. 1780), it would provide another tool for use in defective pricing cases. The act would provide administrative penalties for fraud that can be proven under a lower standard of proof than the False Claims Act. The Office of the Inspector General continues to support such an act.

Even if there is no fraud in a defective pricing case, the contractor often benefits from interest-free use of Government funds. In many cases, DCAA does not perform the defective pricing review and detect the violation until two or three years after the contract price was negotiated. The case may require months or years to negotiate or litigate a settlement. I believe that the contractor should be required by law to reimburse the Government for the use of its funds at the prevailing U.S. Treasury rates. In addition to stopping the interest free use of Government funds, such a law would provide contractors with an incentive for resolving defective pricing cases in a more timely manner, since interest should accrue from the date of contract to the date of repayment.

REFERRALS FOR CRIMINAL INVESTIGATION

I believe that in every instance of defective pricing where there is a possibility that the certificate was in any part false, fraudulent or fictitious, the matter should promptly be referred to a DOD investigative agency. I have instructed the Assistant Inspectors General for Auditing and Criminal Investigations Oversight and Policy, OIG, DOD to be alert to these kinds of cases. A list of potential fraud cases involving defective pricing and referred for investigation was provided to the Chairman of this Committee on March 28, 1983. We are also in the final stages of negotiating a Memorandum of Understanding between DOD investigative agencies and DCAA which will help to ensure early and direct reporting of potential criminal violations.

USE OF 100 ADDITIONAL SPACES

Public Law 97–252 specified that at least 100 spaces be transferred to the IG, DOD for contract audit operations. Ten of the 100 spaces will be used to augment contract audit policy, oversight, and followup functions in the Office of the Assistant Inspectors General for Audit Followup and Audit Oversight and Policy. Action is under way to fill these vacancies.

The balance of 90 spaces have been allocated to the Office of the Assistant Inspector General for Auditing. These 90 auditors will be the major portion of a 168-person organization devoted to acquisition audits. (The additional 78 personnel will come from a realignment of resources and priorities within the Office of the Assistant Inspector General for Auditing.) These 168 personnel will be organized into three major groupings and 14 separate audit teams. The three major groups will be Major Acquisition Programs, Acquisition Support Programs, and Contract Audit Programs.

The Major Acquisition Programs group will consist of four audit teams devoted to reviewing complete weapon systems. For example, these audit teams would review all aspects of a single weapon system, or family of systems, covering both the DOD management and the contractor(s) management of the program. The teams will be organized along weapon system functional lines (Aeronautical Programs, Land Forces Programs, Naval Forces Programs, and Space Programs).

The Acquisition Support Programs group will do cross-cutting reviews of the same function across many weapon systems or activities. Configuration management, competition in procurement, and life cycle costing would be examples of audits that these teams would conduct. The audit teams will be for Procurement, Contract Administration, Research, Development, Test and Evaluation support and Acquisition management.

The Contract Audit Programs group will consist of six teams. These include four teams of contract auditors and two teams of technical specialists knowledgeable in the technical areas supporting the procurement function (e.g., engineering, cost estimating, quality assurance, and contracting). The technical teams would provide specialized technical assistance to contract audit teams as well as any other audit teams needing it. The majority of their work is expected to be in the major acquisition areas. The contract audit teams will perform reviews of contractors in conjunction with the review of weapon systems, assuring that a comprehensive review of a program or problem area is accomplished. They would also conduct broad reviews of activities that affect DOD contracts and contractors in general. These teams would conduct or assist in audits such as those involving the use of the contract auditor input in negotiations, the authenticity of contractor cost estimates on weapon systems, progress payments, contractor make or buy decisions, subcontractor purchasing procedures and competition therein.

Action to fill all vacancies is under way. Recruitment is Government-wide and open to all sources. As of March 4, 1983, we had mailed over 450 announcements to interested individuals, answered over 700 telephone inquiries, and had 598 qualified applicants. Selection panels have been formed, and applicants are being reviewed.

We plan to bring the first group on board by the end of April. We are hiring by audit team so that as personnel arrive, they will be able to begin work very quickly.

Mr. Chairman, that completes my statement. I am available for questions.

Mr. VANDER SCHAAF. Thank you, Mr. Chairman.

I am prepared to answer any questions you may have.

STATEMENT OF CHARLES O. STARRETT, JR., DIRECTOR OF THE DEFENSE CONTRACT AUDIT AGENCY

Mr. STARRETT. Senator Warner, Senator Levin, it is a pleasure for me to appear before this committee to discuss certain aspects of the noncompetitive procedures for evaluating bids and proposals for Government contracts, specifically the dollar threshold for submission of cost and pricing data.

DCAA is an independent audit organization that furnishes auditing and financial advisory services to the acquisition community. We play an active part in the acquisition process.

We are trained and experienced in auditing the accounting systems and the actual and estimated financial representations of commercial organizations—that is, private companies who supply goods and services to the Government under contracts.

The Defense Contract Audit Agency employs a three-pronged approach to the evaluation of contractor bids and proposals; namely, emphasis on surveys to determine the adequacy of contractor estimating systems, strong efforts to obtain adequate data during pre-award audit reviews, and performance of post-award defective pricing compliance reviews.

This approach is premised on the belief that it is more advantageous to the acquisition community as a whole to correct estimating deficiencies causing defective pricing before they occur instead of relying upon compliance reviews to detect defective pricing after the contract prices have been established. Deficiencies in cost estimates can arise from the contractor's use of incorrect, incomplete, or noncurrent data. Accordingly, we spend a significant amount of effort in our estimating system surveys to prevent the occurrence of such deficiencies. Over the last 2½ years, we have expended 52,000 direct audit hours on this effort and issued approximately 410 survey reports.

A second way in which the Defense Contract Audit Agency attempts to identify deficient estimating techniques causing defective pricing occurs as an integral part of the Agency's program to review and evaluate estimated costs in proposals submitted by contractors in connection with the award, administration, modification, or repricing of Government contracts. The evaluation of contractor pricing actions is the Agency's highest priority program. Last year alone, the Defense Contract Audit Agency expended 1,800,000 direct audit hours to review 27,200 bid proposals. We reviewed about 8,500 firm, fixed-price proposals under $500,000 in 1982. These audits resulted in $179 million savings to the Government at a cost of about $8.2 million. That is a return to the Government of $21.70 for each dollar spent by the Defense Contract Audit Agency.

Somewhat less but still substantial savings are realized from the preaward audit of fixed-price incentive and cost-type proposals. These savings cannot be realized without a quality audit of detailed contractor cost and pricing data. What is needed is a requirement for the data and the audit. I believe that the savings attained in the past warrant the lowering of the firm, fixed-price preaward audit threshold back to $100,000.

I want to express my appreciation for the opportunity to appear here today.

I will try to answer any of your questions.

Senator WARNER. The Chair is going to reserve the questions it has for subsequent witnesses.

I now defer to my colleague, Senator Levin.

Senator LEVIN. Thank you, Mr. Chairman. I have just a few questions.

First, I want to commend the representatives of the agencies we have before us today. They have taken a position in these agencies different from and independent of the Department of Defense's position on this matter. I think that bodes well in terms of the relationship of these agencies to the Congress and, indeed, of these agencies to the Department of Defense.

I think their testimony is extremely important testimony on a very, very critical issue, something that I have had deep interest in since I have been able to add this amendment at the Government Affairs level to this bill. The fact that they are taking a position different from the DOD on this matter, again, I think is highly significant, above and beyond the merits of the matter in front of us.

You are both supporting this provision and as I understand it, if we adopt this provision, it will bring the DOD in line with the rest of the Government; is that correct?

The other Government agencies now have a $100,000 threshold?

Mr. STARRETT. I believe that is correct.

Mr. VANDER SCHAAF. I am not certain about that, Senator Levin.

Senator LEVIN. By regulation?

Mr. STARRETT. The Federal procurement regulation currently, I believe, is still at $100,000.

Senator LEVIN. If, in fact, that is true, that would bring DOD into line with the rest of the Government?

Mr. STARRETT. That is correct, I believe.

Senator LEVIN. Second, you indicated to us there will be savings, by returning to the $100,000 threshold, of over $170 million after deducting the cost of audit. This does not include, as I understand it, the savings which we gain from the deterrent effect?

Mr. STARRETT. That is correct, it does not include that.

Senator LEVIN. Is there any way of estimating how much additional we save from the deterrent effect of returning this provision to law?

Mr. STARRETT. If I might, could I take a little time and walk through these charts because we are talking about a preaward review and S. 338 if it were to be amended to say $100,000 might still result in our not reviewing the proposals on the left side.

Senator LEVIN. Is there a deterrent effect of this provision?

Mr. **Starrett.** There is a deterrent effect, yes, sir.

Senator **Levin.** Are you able to give us the dollar value of that deterrent effect?

Mr. **Starrett.** I don't have any idea how I might estimate that.

Senator **Levin.** Would you be able to say that the deterrent effect does indeed have value to the Government?

Mr. **Starrett.** Yes; definitely.

Senator **Levin.** My only other question of Mr. Starrett before we go to the charts is the statement that somewhat less but still substantial savings are realized from the preaward audit of fixed-price incentive and cost-type proposals?

Mr. **Starrett.** Yes, sir.

Senator **Levin.** Even though those savings are not as substantial as they are on firm fixed-price contracts, nonetheless we do make savings in those areas as well?

Mr. **Starrett.** That is correct. That is the $4 million over here on the left.

Senator **Levin.** I am sure the charts will be beneficial to us. Perhaps you could walk through the charts.

Mr. **Starrett.** The point of these charts is that S. 338 would amend Public Law 87–653 to provide for a $100,000 threshold when it is currently $500.000

On this left side where we are talking about reviews of proposals these requirements are set administratively by the defense acquisition regulation. What I think is important here is to make sure that we are all talking about the same thing.

What we have done is use the statistics from our preaward audits in developing what we would consider to be thresholds and above these thresholds we believe that an audit should be obtained.

Currently the defense acquisition regulation says above $500,000 you will get an audit and discourages audits below $500,000. Presently, of course, Public Law 87–653 is $500,000 and this amendment that we are talking about would lower it to $100,000.

If we were to review proposals between $100,000 and $500,000 for firm fixed-price contracts, based on 1982 experience in this area, we would save in excess of $170 million.

Now if the defense acquisition regulations were changed to provide for these thresholds and we were doing these audits, then the advantage that S. 338 would provide us is the cost and pricing data and the certificate for proposals between $100,000 and $500,000 for firm fixed price and for proposals between $250,000 and $500,000 for incentive type contracts.

Those are the advantages as I see it from an audit standpoint. The Department of Defense has looked at other things besides the audit standpoint and they have considered an administrative cost saving that would accrue to the smaller contractors and they have also considered that even though we might not do these audits under the new DAR $500,000 threshold, nevertheless some of these savings would accrue because the contracting officer would be reviewing the proposal.

I really don't have any feel for how much that is.

Senator **Levin.** Would that be a small percentage of it, do you think?

Mr. Starrett. Based on what it is that we are doing in the firm fixed-price area and we are utilizing the data from the contractors' records, I don't think it would be a great percentage.

Senator Levin. Whatever administrative costs there are, large and small contractors would accrue savings?

Mr. Starrett. That is correct, and the cost primarily would be in the identification and submission of the cost and pricing data. The certificate does not cost anything.

Senator Levin. The data is already in their files presumably because they based their proposal on that data; is that correct?

Mr. Starrett. That is correct.

Senator Levin. Until a few years ago we always required that, and all other agencies of the Government now require it by regulation.

Mr. Starrett. My understanding is that that is correct.

Senator Levin. Those are all the questions I have.

Senator Quayle?

Senator Quayle. I really don't have any questions of Mr. Starrett. I do have some questions of later witnesses.

I am concerned about the competition on the subcontracting basis and particularly those industries that deal with spare parts where 90 percent of them are sole source contracted. I know in my State and your State we have a lot of small contractors.

I am going to be asking questions later on that might give us some language to enhance that competition, but I don't believe that is in Mr. Starrett's area since he is in auditing. I will reserve those questions until later.

Senator Levin. Mr. Vander Schaaf, I do have another question.

Do you recommend we return to the $100,000 threshold on all three kinds of contracts?

Mr. Vander Schaaf. I don't think it is essential in the cost-plus contract. However, for fixed-price contracts, either the fixed price incentive or firm fixed-price contract, I recommend going back to $100,000.

I don't believe lowering the threshold costs anything. When you are negotiating with a contractor the whole objective behind the Truth in Negotiations Act is to have both parties lay their cards on the table to insure that they are both aware of all the available information. To the extent that we don't have all the information we ought to be able to obtain it.

Senator Quayle. I might ask one question.

Have you done any investigation on the sole sourcing on subcontractors, spare parts in particular?

Mr. Vander Schaaf. We have some work underway now, not with respect to the sole sourcing, sir, but I believe we have a draft audit going out today on price increases on engine spares. It is a draft. I don't feel I should talk about it until the services have had an opportunity to comment on it.

Senator Quayle. Do you believe that that report and the contents thereof would be an implication on this legislation, potentially?

Mr. Vander Schaaf. Potentially, yes, sir.

Senator Quayle. Go to the issue that I am talking about, spare parts?

Mr. **Vander Schaaf**. The issue of breakout and trying to get competition on spare parts, yes, sir.

Senator **Quayle**. When will this report be released?

Mr. **Vander Schaaf**. The services will have 60 days to comment on that particular audit once it is out. There are a number of other audits on spare parts breakout. There have been hearings over on the House side in recent months on this problem as well.

Senator **Quayle**. Have you looked to see if this legislation does, in fact, direct itself to the competition——

Mr. **Vander Schaaf**. I have not attempted to take this bill and see how it would effect those particular problems identified with the procurement of spare parts, Senator.

Senator **Quayle**. I would like to tell the chairman I have a problem from 3 to 4 in that I am supposed to preside over the Senate. I don't know if you are going to go on, but I did want to be here to ask questions of the last witness, Mr. Hahn, on the issue of subcontracting on sole source.

Senator **Cohen**. I anticipate we will still be going by 4. If not, I will ask the questions.

All the questions I have may have already been asked, but let me put some of them to you and if they have been answered, you may indicate so.

According to a DCAA memo to the DAR Council, dated December 1981, "proposals below the certification threshold must still be supported by contractors . . .". The Department of Defense has offered a rationale, however, that we should increase the threshold because it will ameliorate paperwork burdens on contractors. There are two questions that I have.

If contractors are still required to submit cost and pricing data for pre-award audits for contracts above $500,000, what additional work burden will be imposed on a contractor by requiring certification?

Mr. **Starrett**. DAR discourages obtaining cost and pricing data on proposals below $500,000. I think maybe in 1981 that statement might have been true, but it is no longer true. The defense acquisition regulation has been changed to a $500,000 threshold and discourages the submission of cost and pricing data below that level.

Senator **Cohen**. Why is that?

Mr. **Starrett**. In consonance with the change in Public Law 87-653 to be in agreement with the $500,000 for certification and submission of cost and pricing data.

Senator **Cohen**. But why is that? What is the rationale behind that? Does it impose an additional paperwork burden?

Mr. **Starrett**. There is some cost involved in the identification of the cost and pricing data relating to proposals under $500,000.

Senator **Cohen**. Are you aware that the Office of Federal Procurement Policy indicated in a letter to us that the impact of lowering the threshold to $100,000 would be very minimal in the way of additional paperwork?

Mr. **Starrett**. The Defense Contract Audit Agency really has not looked at that particular side. The Department of Defense's position is that there would be administrative cost that contractors would save.

Senator COHEN. Let me go back and see if I can refresh my own recollection. As I recall from the testimony on Tuesday, the witnesses indicated that the contracting officer would always have the discretion to go back and require certification of pricing information if he chose to do so, but that would not be mandated.

It occurs to me that if he can do that now, contractors still have to maintain records, don't they?

Mr. STARRETT. Yes.

Senator COHEN. The contractor still has to maintain records as to whether or not the information he is supplying to the Government is accurate, complete, and current to the best of his knowledge.

Where is the additional paperwork involved if all you have to do is sign a piece of paper saying, "I certify that the following facts and figures are accurate, complete, and current to the best of my knowledge"?

Mr. STARRETT. It is in the identification of the cost or pricing data that is used to support the estimates in the various cost elements of the proposal. The certification, I agree with you 100 percent, would cost very little, but the identification of the cost and pricing data that is in the records of the contractor that are used to support the estimate is what has to be done under Public Law 87-653.

If it were raised to $500,000, why then there would be no such requirement.

Senator COHEN. Mr. Vander Schaaf, on page 2 of your testimony you state:

> First, we believe it would add no administrative effort to DoD and very little effort for contractors. We doubt that any competent contracting officer would negotiate a deal over $100,000 without requesting cost or pricing data.
>
> Thus, we believe there was no real reduction in the contractors' paperwork burden by raising the threshold. Restoring the threshold to $100,000 will make contractors more inclined to submit accurate, complete and current pricing proposals since their contracts would be subject to price adjustments under the provisions of the Truth in Negotiations Act.

Mr. VANDER SCHAAF. That is our case, sir. If I can elaborate slightly on that, I think we are arguing about the kind of cost and pricing data that the contractor has to submit, how we interpreted it and what the contracting officer specifically requires the contractor to provide. That is not a legislative matter. That is an administrative matter within the Department of Defense.

It is our position that whatever he requires the contractor to submit, ought to be accurate and complete, and he ought to be willing to certify that that is the case.

A contracting officer may have a smaller contract under $100,000 where he may not want the contractor to go through the whole 633 process—this is the form that the bid and proposal is placed on—but he will, however, want whatever data he gets to be accurate.

Senator COHEN. I guess the question I have is, was there a memo in December 1981 in which the DCAA indicated it was opposed to increasing the threshold from $100,000 to $500,000?

Mr. STARRETT. Yes, sir; that memo was to the defense acquisition counsel, as I recall. We were talking about the preaward area over here and as I have stated earlier, the preaward thresholds are handled by the defense acquisition regulations and we would like, from an audit standpoint, to review pricing proposals on a preaward basis at the thresholds of $100,000 for firm fixed-price, $250,000 for incentive price, and over $500,000 for CPFF.

That is an administrative matter. My concern is that you could lower the threshold under Public Law 87-653 to $100,000 and the audit requirement in the DAR might still stay the same.

Senator COHEN. Let me read the memo because I don't think it is confined to preaward audit. It says:

> DCAA must take exception to increasing all thresholds for certification of cost and pricing data and field pricing support to the $500,000 level. We believe the certification requirements may reasonably be increased to match the current levels for field pricing support; however, we believe DOD would sacrifice substantial contract savings by raising the thresholds for field pricing support on fixed-price proposals to $500,000.
>
> During fiscal year 1981 we questioned over $223 million in proposed costs on firm fixed-price proposals in the $100,000 to $500,000 range, with net savings of $160 million to the Government. This represents a ratio of contract savings to audit costs of about 20 to 1. We achieved a similar payback ratio on fixed-price incentive contracts in the $250,000 to $500,000 range.
>
> Proposals below the certification threshold must still be supported by contractors, and those not subject to field pricing support must be subjected to an adequate review by procurement offices. Therefore, we believe any minimal savings in contractor and Government efforts would not justify the increased price risk of a blanket $500,000 threshold.

Mr. Starrett, the key words are "field pricing support." What we were trying to do was to make sure that the DAR was not changed to say $500,000. However, it was changed to read $500,000 and it discourages review below $500,000. We were concerned that the field pricing support would not be obtained for proposals less than $500,000.

Mr. VANDER SCHAAF. If you reduce the certification to $100,000 on a postaward under Public Law 87-653 or you leave it at the $500,000 level. There is still the fear that contracting officers will not request the Defense Contract Audit Agency to do the kind of field reviews that should be done on contracts that are below $500,000 because there is no real way for them to recover any mischarges or any defective pricing that results from those reviews.

Without the certification it is difficult to recover; therefore, they probably would not ask for audit work on those contracts.

Senator COHEN. Don't they have to resort to a lawsuit if there is defective pricing?

Mr. VANDER SCHAAF. Yes, but it is almost impossible to prove intent.

Mr. STARRETT. If it is below $500,000, and we don't get a certificate, there would not be a way to support a defective pricing finding.

Senator COHEN. There would be no way to determine?

Mr. STARRETT. You would not have the certificate. You would not have a date to be working from to determine whether the data is current, accurate, and complete.

Senator COHEN. As I recall from DOD testimony 2 days ago, Ms. Gilleece said the contracting officer, even though there is a $500,000 threshold, would nonetheless have discretion to require certification between $100,000 and $500,000. That is an exception to what you are saying?

Mr. STARRETT. It is an exception.

Senator **Cohen**. If he has discretion to call for it in the first instance, my question is, What is the burden if you make it a mandatory policy? I don't understand. Maybe there is a reason for it, but I just don't understand it. It just requires a brief certification that the facts in this bid that we submit are accurate, complete, and current to the best of his knowledge.

Isn't that what it requires?

Mr. **Starrett**. There are two things that are required. There is the identification of the cost and pricing data, which is the more complicated part of it, and the second one is the certificate.

The certificate is no problem, but the identification of the cost and pricing data, meaning if you had a bill of materials and you have unit prices for all these items and you could have a number of items on the bill of materials, the identification of the bill of materials and how you go about pricing that would be required under this law for a proposal less than $500,000 if you went with the full implementation of it.

Senator **Cohen**. How does the contractor submit a bid if he doesn't have the unit cost?

Mr. **Starrett**. He still has to go through that process.

Senator **Cohen**. He can't submit a bid unless he knows what his prices are.

Mr. **Starrett**. He has to have some basis for the estimate.

Senator **Cohen**. All we are saying is whatever you base your bid upon, certify that it is accurate, complete, and current to the best of your knowledge.

Mr. **Starrett**. And submit to the Government the identification of the cost and pricing data.

Senator **Cohen**. But he has to have that in his files anyway.

Mr. **Starrett**. He has to have a basis for the estimate.

Senator **Cohen**. He has to have those figures?

Mr. **Starrett**. Yes.

Senator **Cohen**. Otherwise, he has no way of projecting what it is going to cost to produce that product or that service to the Government in order for him to make a profit.

Mr. **Starrett**. That is right.

Mr. **Vander Schaaf**. He can be a little freer, though, in terms of making that estimate if he doesn't have to certify to it because he knows that without the certificate, no one can challenge his data later.

Senator **Cohen**. In other words, he can pad it a little bit?

Mr. **Vander Schaaf**. Yes.

Senator **Cohen**. Has the experience been that there is defective pricing within the $100,000 to $500,000 range?

Mr. **Starrett**. No, sir. As a matter of fact, it is not cost-effective to do defective pricing audits below $500,000.

Senator **Cohen**. The question I ask is whether or not there has been any historical experience of defective pricing in the range from $100,000 to $500,000, not whether it is cost-effective or not.

Mr. **Starrett**. I would say it is not a significant problem at all below $500,000. If there is defective pricing, I don't believe it to be a significant amount.

Senator **Cohen**. Why does it become significant above $500,000? If you don't have defective pricing and you have to certify that it is accurate cost data, why does it become more of a problem when you certify than when you don't certify?

Mr. **Starrett**. When you get into the larger procurement then we are dealing with more money, therefore it becomes more significant. In addition, looking at the significance of various types of audits, the preaward reviews that we were talking about here under $500,000, we have a return of approximately $21, something like that, $22, for every dollar that we invest in the audit of these proposals. That is an effective use of resources. But on the other hand, to look for defective pricing in proposals on a postaward basis due to contracts below $500,000, the low incidents of defective pricing and the small amounts involved lead us to put resources into other areas.

Senator **Cohen**. According to your statement, you reviewed about 8,500 firm-fixed price proposals under $500,000 in 1982 and the audit resulted in $179 million saved to the Government at a cost of $8.2 million.

Mr. **Starrett**. Those are preaward reviews, not defective pricing audits. Those are reviews of the proposals before the contract is let.

If you would like, I will walk through the charts again. That is the point I was trying to make earlier.

There are two types of audits here. The one where the savings are involved is in the preaward area. My point was that you could even change S. 338 to $100,000 and the DAR could stay the same and we still would not review these proposals. That is in essence my message.

Mr. **Vander Schaaf**. Senator, I don't believe the contracting officer would want to take too many chances and fail to ask the Defense Contract Audit Agency to review those proposals if he knew they had to be certified. He just wouldn't take that chance. He would be more likely to have the contract proposal audited.

So, the one thing has an impact on the other.

Mr. **Starrett**. There is a definite impact. The advantage of S. 338 is if we were to review on a preaward basis the proposal over the thresholds that we have identified, we would then have in support of those proposals the cost and pricing data and the certificate.

Senator **Cohen**. I received a letter recently from a man who said he is a career employee with 24 years in the aerospace industry. He said:

> As a career employee with over 24 years in the aerospace industry, I am strongly in agreement with your amendment to S. 338 to lower the threshold on certified cost and pricing data for Government contracts. I am corresponding as an individual and not as a representative for my present corporation which is a very large prime contractor.
>
> I also prefer to not name the corporation. My experience has been working for prime contractors with subcontractors. It should also be noted that approximately 95 percent of my peers share my opinions. The reasons for lowering the thresholds to $100,000 are as follows:
>
> 1. Any threshold gives companies an open checkbook on prime contractors and the Government. Naturally companies prefer high thresholds for rip-off purposes.
> 2. The added administrative burdens claimed by companies (below $500,000) is nothing more than a clear cover-up. The submittals of DD Form 633 requires little intelligence or time.
> 3. Cost savings resulting from a lower threshold will far outweigh overhead or administrative cost.
> 4. The current higher threshold of $500,000 condones inefficiency, waste, and significant overpricing.
> 5. Every current repair and overhaul contract under $100,000 should have random requirements to withstand scrutiny.

Do you find that to be a reasonable statement or unreasonable statement? Do you think there is any merit to what he is saying?

Mr. STARRETT. I believe there is some merit to what he is saying, yes. There were five items I was writing down there. There are advantages to having audit review proposals above certain thresholds.

These preaward reviews would help the Government save money if we had cost and pricing data and a certificate that would support proposals over the dollar thresholds that we are talking about. It is in that area that from an audit standpoint we are saying we think we can save money.

Senator COHEN. Aside from the fact you might not want to devote those kinds of resources to audits of contracts below $500,000, does requiring certification at least serve as a deterrence to defective pricing?

With verification, the Government will be able to get a reduction or rebate or something on the contract. Would you agree that the mere presence of such a certification acts as an insulating factor against a little bit too much discretion being exercised in the pricing?

Mr. STARRETT. Yes, sir.

Senator COHEN. From a cost-effective point of view you believe, as I understand it, that if you just confine this threshold level to the preaward audits as opposed to the postaward, that you are going to have more cost-effective concentration of Government resources against the number of contracts that are let.

I may agree with that because you don't have enough resources. You don't have enough devoted to the audit activities. I think, Mr. Vander Schaaf, you are the one who recommended doubling the audit activities. My only question is:

Assuming that it would not be cost effective in the sense we don't have that many audit personnel to conduct these audits on a widescale basis, would not the presence of that certification nonetheless serve as a disincentive to overpricing in contracts below $500,000?

Mr. STARRETT. There is a policing effect in obtaining the certification, yes.

Senator COHEN. That is all I have.

Gentlemen, thank you very much for your testimony.

Professor Cibinic, over the past few years your assistance has been greatly appreciated. Your name was invoked at our last hearing by one of the major witnesses from the DOD who turned out to be one one of your former students. She presented some very detailed testimony.

I will ask you some questions pertaining to that in a moment. Why don't you begin.

STATEMENT OF PROF. JOHN CIBINIC, JR., GOVERNMENT CONTRACTS PROGRAM, NATIONAL LAW CENTER, THE GEORGE WASHINGTON UNIVERSITY

Mr. CIBINIC. Thank you very much for the opportunity to participate in these hearings, Senator Cohen.

I first would like to state that I am testifying as an individual, not as a representative of George Washington University, nor of any client that I might have. My views are my personal views.

I might add to that, although some people may believe so, I am not on a crusade for competition in Government contracting. I believe it is the proper thing to do. I don't have any vendetta against any particular agency involved in this activity.

I have had a considerable amount of background and experience in negotiating contracts prior to the time I came with the National Law Center.

Senator COHEN. Why don't you just review your background a bit. I have your biography, but I don't have it here for inclusion in the record. I think it would be helpful to show that you have had a rich and diverse background, not only being an academician, but having some practical experience on the line as such.

Mr. CIBINIC. Before I came to work for the Government I worked in purchasing in the construction industry when we worked on a cost, plus a percentage of cost job. There were very few restrictions on our purchasing in that activity but we had a group of auditors following us all the time.

I came to work for the Government and worked for the Department of the Navy negotiating major airframe weapon systems contracts. All those negotiations were sole-source negotiations.

Senator COHEN. When did that take place?

Mr. CIBINIC. That was in the 1956–60 time period.

The major contract negotiations that I had—the dollars pale by today's standards—were in the realm of $240 million contracts, even today fairly substantial sums. I think probably with inflation we are talking about $1 billion plus. So I had that experience with sole-source contracting working for DOD.

I went to work for industry and in my industry job I was both manager of contracts and counsel and active in the missile-launching equipment for intercontinental ballistic missiles. In fact, one of our projects, the Titan I project, was this country's first operational ICBM.

Very shortly thereafter Mr. Kennedy exposed the Cuban missile crisis. I was on the selling side of a number of sole-source contracts for that type of equipment.

Since that time I have worked with many of the civilian agencies as well as with many clients that do business with the Department of Defense, both in the competitive and noncompetitive areas.

I have had much experience with sole-source contracts and with competition in Government contracts from the hands-on point with DOD, both as a Government employee and as an employee for contractors and as a representative of contractors who do business with the Government.

From my observations, I believe that there are many more opportunities for competition than are recognized by people in the Government. If properly implemented, competition can have a very beneficial effect. We can get better prices, better quality, and more public confidence in the procurement system if we use competition and use it wisely and effectively.

I think to do that we are going to need something like S. 338. I just do not think that there will be a lasting change in the attitude of many people in the Government who believe that competition ought to be accomplished when they think it is beneficial but not when they don't think it is beneficial.

There are many people in the Government who believe that a particular contractor in a particular situation may have a technical and administrative superiority and in their minds there would be relatively little savings of cost to go competitive.

I do not question the good faith of their belief. On the other hand, we have had so many experiences, testimony that you have heard in the Governmental Affairs Committee and in other congressional investigations as well as material published by DOD, that shows that when they have tried competition they get some surprising results.

It does not always work. Sometimes they are right. Sometimes going into competition costs money and you don't necessarily get a better price. But, by and large, in most situations it is beneficial and over the long run extremely beneficial.

As an example of how competition might come in, I just would cite an incident that occurred last year. Follow-on contracts are typically noncompetitive. Once a contractor wins the first contract for a major weapon system, it may not be very practical to go out and seek a competitor for follow-on buys. I say, may not be. Sometimes it is, sometimes it isn't.

But last October, Navy Secretary Lehman announced that he had concluded contract negotiations with McDonnell-Douglas on a $1.4-million, firm, fixed-price contract for 63 fighter attack F–18's for fiscal year 1982. Now that had been a long, protracted negotiation. Secretary Lehman was trying to get a decrease in price from McDonnell-Douglas and McDonnell-Douglas was holding firm.

However, he threatened to cancel the F–18 program and buy F–14's and A–6's from Grumman instead. He attributed the 5.7-percent decrease in price from 1981 to that.

I am not suggesting that we threaten cancellation in each case of a major weapon system. I just cite that as an example of a procurement which people had assumed was a sole-source contract and that McDonnell-Douglas was going to get that deal.

We can make competition in very many situations but there needs to be a change in attitude. There are not enough cases where people are willing to do those kinds of things to bring in competition.

I might also point out that just having more is not always better. The quality of competition needs to improve. I think that S. 338 speaks to that in ways in which the procurement personnel should be able to understand as well as the people who draft the requirements.

It is not always the contracting officer who decides whether a purchase is going to be sole-source. In fact, very seldom does the contracting officer make that decision. It is usually the person who identifies what is to be purchased and drafts the specifications.

So, the drafting of specifications and identification of needs is important to make competition work properly. When it gets to the contracting officer, he needs to conduct the competition in a fair and scrupulous manner but also needs to make sure that he is not overdoing competition.

You might say, how can you overdo competition? In certain situations, particularly when technical competition is involved, selection of a number of offerors consistent with those available in that particular market, the dollar value of the procurement, and other factors, is of critical importance.

Because competition involves cost, there is a proposal cost for everyone involved in the competition, that goes into the overhead and the Government is ultimately going to pay for it, the more proposals you have, obviously the more competition you have, but there will be a point of diminishing return.

I think that the General Accounting Office and a number of procuring agencies have recognized this from time to time.

In addition, every proposal that is received is supposed to receive a good faith review. Thus, there is a considerable amount involved in the Government's administrative cost. In addition, if you have an overly great number of competitors, let us say 300 competitors, for a $60,000 study job, which you might have in this day and age, you are getting into a situation where someone who is seriously interested in that contract, and a very good and competent contractor, may just not choose to compete because the chances of winning are too slim.

That may appear to be an unusual situation, but I have seen a number of cases in which we have had 80 and more offers. That doesn't make the competition effective.

What you need to have is an effective competition that goes from the specifications on down to the way that covers it. I think S. 388 speaks to that and hopefully it would work well.

Now, as far as the limit on noncompetitive procurement, Senate 338 contains six exemptions. My review of those exemptions and the types of noncompetitive procurement that we have had in the past, I believe they furnish both the Department of Defense and the civilian agencies all the reasons and rationales that they need to have noncompetitive procurement.

I do not believe that they need additional exemptions. I particularly would be opposed to an exemption for unsolicited proposals. I point out in my prepared statement that I think that there is too much opportunity for abuse.

Senator COHEN. Are proposals ever truly unsolicited, in your experience?

Mr. CIBINIC. Very seldom. When I say unsolicited we all have knowledge of solicited-unsolicited proposals. Solicited-unsolicited proposals break down in several different ways.

There can be an exploratory discussion between a Government engineer, technical person or scientist, and a contractor on the other side in which they talk generally about an area and an idea strikes the contractor, the contractor goes home to his plant or office, spends some time and money to put that idea into substance and sends in a proposal. There is very little solicitation in that.

On the other hand, the germ of the idea was placed there by the Government person. He did not place it only with one individual. If somebody else had talked to him about that, he might have placed the germ of the idea there.

That is probably a small part of unsolicited proposals. The larger part of unsolicited proposals come in in these discussions when there is a more definite indication of what the Government needs or what they would like to see.

Quite often that results in a proposal which is very close to the Government project manager's desires. I think that is probably the major majority of them.

Senator **Cohen**. Could I prevail on you to stay a bit longer?

I will declare a 10-minute recess. The committee stands in recess.

Senator **Levin** [presiding]. The committee will come to order.

Senator Cohen asks that I continue the process while he goes over and votes.

Professor Cibinic, I gather you were in the middle of a sentence or paragraph when we had to interrupt you. You may proceed from where you were.

Mr. **Cibinic**. Senator Cohen and I had begun a discussion about unsolicited proposals and possibly I ought to put that discussion in a little more context.

There seems to be much concern that S. 338 would have some chilling effect upon the submittal of meritorious unsolicited proposals.

I think you will find that S. 338, as it is drafted, is silent on unsolicited proposals and the only statutory provision that we presently have on unsolicited proposals has a chilling effect upon them. That is a proviso that was put in the Armed Services Authorization Act, I believe it was 2 years ago, providing that sole source awards would not be made for unsolicited proposals for studies and other types of contracts.

I don't think there is any chilling effect on solicited proposals by S. 338.

Senator **Levin**. Would you oppose such a provision if it existed, whether it is S. 338 or some other existing authorization, or if somebody proposed to put it in S. 338? Would you oppose a provision that had such a chilling effect?

Mr. **Cibinic**. I don't think unsolicited proposals should be singled out either for favorable treatment or unfavorable treatment.

H.R. 2545 has a provision in it which would give unsolicited proposals special status. I don't think that that would be appropriate.

As I stated in my prepared statement which will be included in the record, I think that there is too much opportunity for improper activity in that area.

There is sufficient basis under the first exemption of S. 338 to allow procurement officials to make an award on a sole-source basis on an unsolicited proposal if the offeror offers services or supplies that can be purchased from no one else and they are needed.

Senator **Levin**. Isn't it a question of whether or not you are going to chill the creative suggestion that even though somebody else could perform the study or carry out the contract, that nonetheless what we want to stimulate are the proposals themselves and we will never get them or very few of them? Isn't that the issue?

Mr. **Cibinic**. That may be the issue. Again I would say that S. 338 would not be chilling. There has never been any provision in statute which would assure anyone of a sole-source award by submitting an unsolicited proposals and in fact within the procuring agencies we have many incidents, some of which have been reduced to litigation where the agencies have gone competitive when they have received unsolicited proposals and yet they continue to receive unsolicited proposals.

If there is any chilling of unsolicited proposals, it has been the activity of the procuring agencies themselves in the past. Several years back American Airlines suggested that rather than buying more KC-135's brand new from Boeing that they might buy some 707's that American Airlines had.

I think the 707's were ultimately sold to the Government by Boeing. There was one case in which the recipient didn't receive the contract.

For a more recent example, there was an announcement, I haven't checked on it recently, by Rockwell International and Lockheed that they are going to develop their own version of the Stealth bomber to compete with Northrup who has joined with Boeing, Vought, and GE.

Obviously if the Air Force does not invite them to submit a proposal, they are going to submit it unsolicited. I presume that activity is still going on. That is in an environment in which there is no statute which favors unsolicited proposals and I don't see why you would need one in S. 338.

For example, if Rockwell and Lockheed did in fact develop a Stealth bomber and sent their unsolicited proposal to the Air Force, presuming that the Air Force did not invite them in to the competition, and they submitted trade secrets and commercial information in confidence and the Air Force decided that their bomber was so far superior to that of Northrup that there was just no opportunity for any meaningful competition, they could go sole source to them. In fact, they would have to go sole source to Rockwell and Lockheed to buy that bomber or if they wanted to buy one for test. They would have to go sole source because Rockwell and Lockheed had submitted proprietary data in confidence.

Now, what is it that motivates Rockwell and Lockheed to announce that they are going to use this technique? It is not a provision in any statute which exists now which accords any special treatment to sole source procurement. It is because they think that they have an opportunity of competing for the job if they do that.

Senator LEVIN. Do you think there is any difference between research proposals and proposals for hardware?

Mr. CIBINIC. There are two kinds of research proposals.

One research proposal has as its aim the receipt of a grant. That is where the agency may have a certain amount of money to support scientific research. In that particular type of proposal, if the Government is going to support the scientific research through the use of the grant, the procedures which we have in S. 338 would not apply.

The Federal Grants and Cooperative Agreements Act of 1978 requires contract procedures for contracts, not for grants.

S. 338 applies when the agency seeks the research in support of its mission as opposed to supporting the activities of the particular researcher. Assuming that I was to propose to the Department of Defense that I do some research on sole-source contracting and you do that with an unsolicited proposal, if the Department of Defense—and I suspect they wouldn't at this point in time—decided that they wanted my particular studies in that area and they needed my particular services, they could go sole source under S. 338 on the first exemption, but they would have to justify it.

Senator LEVIN. Only if they couldn't get it elsewhere.

Mr. CIBINIC. Right. If they wanted the thoughts of a particular individual, for example—let us take it back into the area of reality now—if they wanted to have the research done by someone who is the world's greatest expert in laser beam technology, they could justify going sole source to that person.

In each case they would have to justify why they are going sole source. If justified, they would have the basis to do it.

Senator LEVIN. Obviously, I am very much interested in competition. As one of the cosponsors of this bill, I obviously want to promote competition.

I have some concern that we not, as you phrase it or others phrase it, chill the creativity which is very much involved in proposals. I would like to find a way to protect that act of creativity, the very design of the proposal which could be duplicated perhaps by somebody else in terms of the execution, but which could not be duplicated or has not been duplicated in the very design of the proposal itself as to what should be researched.

That is an area we want to protect. I gather you would see some desirability in protecting that provided we are not paying too big a price in terms of the loss of competition, writing an exception which is so broad you could drive an M-1 through it.

Mr. CIBINIC. I don't think that anyone can be opposed to trying to support and create an atmosphere where creativity, innovation, and suggestions developed at private expense are suggested to the Department of Defense.

I think everybody would be in favor of having a statute which would support that. However, I don't really feel that having a statement in the statute is necessary to have that type of activity.

Presently, unsolicited proposals are encouraged both in Federal procurement regulations and in the DAR, hopefully both soon to be supplanted by the FAR, but we don't know about that, when that is going to come out——

Senator COHEN. In the spring of 1984.

Mr. CIBINIC. Under the present statutory provision, the statute is silent. With the exception of the proviso that is in the Defense Authorization Act that I mentioned before the statute is silent on it.

In order to get a sole-source contract, the agencies would have to justify, as they are doing today, the award of that contract under what would amount to the first exception in S. 338.

Now, I guess the way I would respond to you is, is there a need to increase the amount of unsolicited proposals received by the Government?

I think in response to that, I would say it might be so, but I would like to see the Government show what it is doing with a lot of the unsolicited proposals it receives, how many it receives, how it is deciding what they are going to do with it, where they would need additional unsolicited proposals, and things such as this.

I don't think the Government and I am using the term generally; the procuring agencies have done a tremendous amount of homework in in that area.

So, I think that a statute which is neither positive nor negative on the unsolicited proposals would be the best.

Senator COHEN. I think you have expressed some skepticism about the interpretation of the words "innovative" and "unique" as being not well defined or well understood legal terms.

As I recall, your student, in addition to saying the Government was 99 and forty-four one-hundredths pure in its contracting procedures indicated that a very large body of law interpreted terms like innovative and unique. There seemed to be some discrepancy between your skepticism and her testimony.

Mr. CIBINIC. There are two major statutes in the Federal Government which deal with material that would be the kind submitted in an unsolicited proposal.

There is 18 U.S.C. 1905 which makes it a crime for any officer of the Government to disclose information which concerns or relates to trade secrets, processes, operations, or style of work which is submitted in confidence by the contractor.

We also have exemption No. 4 to the Freedom of Information Act, 5 U.S.C. 52(b)(4). That exempts from the freedom of information disclosure requirements trade secrets, commercial or financial information disclosure requirements trade secrets, commercial or financial information obtained from a person and that are privileged or confidential.

Now, those two statutes have a developing body of law in which there are cases in which that terminology, trade secrets, commercial and financial information obtained from a person and privileged or confidential has been interpreted in a number of decisions.

One recent decision dealing with a U.S. Coast and Geodetic Survey contract is *Airborne Data, Inc.* v. *The United States*, 702 Fed. 2d 1350, dealt with an unsolicited proposal which contained trade secret information and which was disclosed in confidence and for which the Government did not award a contract to that contractor, went out on competitive reprocurement.

The Court of Appeals for the Federal Circuit held that the person who submitted that data in confidence was entitled to recover.

So, we have a body of law that deals both with information submitted in unsolicited proposals or otherwise when that information is a trade secret or is commercial or financial information.

Sometimes the term unique, and sometimes the term innovative, may be used within those decisions, but it seems to me that we would be creating further confusion by taking the words unique and innovative outside of the statutes and substituting them for trade secrets or commercial or privileged or confidential information.

Maybe that explains the difference that we have.

Senator COHEN. I would like to come back to it.

On a subject somewhat related to the conversation Senator Levin had with you dealing with whether or not competition per se is necessarily desirable, it may not be desirable in all circumstances.

You gave an example of 90 people competing for a $60,000 contract. This is a change S. 338 makes which promotes an affirmative effort to obtain effective competition as opposed to the present statute which talks about maximum and practicable competition.

It occurred to me, Senator Levin, there might be some analogy with the hearings we had yesterday dealing with social security disability cases. There we found, for example, the administration and Social Security Administration are trying to increase the productivity load of individual hearing examiners, saying you should go from 20 to 25 cases a month to 45 cases a month.

So, we have a maximization of their workload which does not necessarily bear any relationship to the quality that will be coming off that production line.

I compare it to a fast food service. You keep slapping those hamburgers as fast as you can. It doesn't necessarily mean you get a good product.

That is the trouble when you talk about maximum and practicable. On the one hand you can maximize your competition, but it does not necessarily mean it is the best way to go.

On the other hand, practicable has been invoked too often. The words, "It is not practicable to have competition," is invoked too much and we have too many sole-source contracts. You probably share the view that emphasis toward obtaining effective competition is designed to give us as much flexibility as we have to have on competition.

One final point and then we will have to go over and vote unless somebody comes to the rescue.

Secretary Gilleece stated many of these provisions in S. 338 should be left to regulation such as establishing a time period for publication in the Commerce Business Daily and creating a position of advocate for competition.

What advantage is there to allowing it to be in regulations rather than under these requirements of S. 338?

Mr. CIBINIC. I think that a major advantage of having it in regulation is an advantage to the executive branch, which has the opportunity to change it and grant deviations from the regulation whenever they wish to.

It may also have an advantage to Congress. Congress does not need to be bothered every time something needs to be changed, and you are not constantly doing things like rewriting the Internal Revenue Code sentence by sentence.

However, when you have a statute such as S. 338, which is not a statute that goes into minute detail on how procurement is to be accomplished, the need for having that type of flexibility is largely reduced.

On the other hand, the use of regulations to solve the problem has an impact. Regulations don't always get the respect of people in the work force and the contracting community that the statute does. I can give you an example.

You were talking about the truth-in-pricing statute. I worked for the Government at the time the truth-in-pricing statute was being considered. That statute was passed after GAO wrote a report stating that the regulations that previously existed for truth in pricing weren't being followed by the executive agencies.

They don't always have the same respect as the statute does. Something as basic and fundamental as this ought to be covered by statute.

Senator COHEN. Thank you very much.

Senator Levin, do you have any more questions?

Senator LEVIN. Would you recommend retaining those provisions in the bill that set forth the amount of time for alternative proposals?

Mr. CIBINIC. You mean the preaward notices in S. 338?

Senator LEVIN. For instance, there is a provision there if you want to go sole source that you give potential competitors a certain amount of time to send in their proposal.

Would you recommend that we keep those times the way they are in the bill or leave that up to the Administrator?

Mr. CIBINIC. The reason for putting that provision in, Senator Levin, is that quite often a procuring agency will be going sole source because they don't believe that there is another source available. This has happened on a number of occasions.

The purpose of the provision in the statute is to make the procurement agency aware that there are other sources, if they are there. If you do not have a certain minimum amount of time available, then that would be a useless notice.

Senator LEVIN. Would you recommend keeping it?

Mr. CIBINIC. Yes.

Senator LEVIN. Thank you. There are a couple of questions. I have to run and vote. I am not sure I can get back.

Senator NUNN. Do you want me to ask questions for you?

Senator LEVIN. They are for Senator Quayle.

Senator NUNN. These questions are on behalf of Senator Quayle.

Although the avowed purpose of S. 338 is to increase competition in Government contracting, I am concerned about whether S. 338 in its present form will have any significant impact on the problem of increasing competition in contracts for spare parts—an area where contracts are now about 90-percent sole source.

Professor Cibinic, in your view, does S. 338 do anything to increase competition in this area?

Mr. CIBINIC. It lays a groundwork by providing to the agencies that they will use advance procurement planning, market research and preparation of specifications in such a manner as necessary to obtain effective competition.

In some cases they will be able to work that way. Now, will that make sure that they do it?

Obviously the statute will not be self-policing. It will take someone, the IG, Comptroller General or possibly the advocate for competition which is included in the statute to do missionary work in this regard.

I don't know that it cures the problem of spare parts by itself.

Senator NUNN. Senator Quayle further asks do you have any amendment you would suggest to strengthen the spare parts area? Actually he is saying strengthen competition in that area.

Mr. CIBINIC. Senator, I don't see that there should be any special coverage for spare parts. The statute covers spare parts as well as the initial item.

One of the reasons that you have sole-source procurement in spare parts is an agency says "I have to have interchangeability and I can't have interchangeability otherwise."

If you are buying spare parts for an airplane that is going to take off and land from a Navy carrier, you have to be assured of interchangeability. Do you have to go sole source to be sure of interchangeability?

The answer to that is no, there are other ways of being sure. Now, the statute says don't go sole source merely because you need interchangeability. Go sole source because you can't get interchangeability any other way or that the technical risks are too great.

It ultimately comes down to a judgment, you are going to have to trust the judgment of someone in the executive branch that a sole-source contract is proper. There is a reporting requirement in the statute that they are supposed to report at the end of each period, or keep records I should say, not reporting, keep records of the number of sole-source contracts that are awarded and what their justification was.

It seems to me that if the agency continues to do a poor job under the statutory framework, then that needs to be exposed. I don't have in mind right now any specific treatment for spare parts.

Senator NUNN. Do you think the bill as now written does as much in the spare parts area as we can do?

Mr. CIBINIC. Yes.

Senator NUNN. Thank you.

I assume that other members have asked all the questions. We have two more witnesses.

Thank you very much, Professor.

Mr. CIBINIC. Thank you, Senator Nunn.

[The prepared statement of Professor Cibinic follows:]

PREPARED STATEMENT OF PROFESSOR JOHN CIBINIC, JR., GOVERNMENT CONTRACTS PROGRAM, NATIONAL LAW CENTER, THE GEORGE WASHINGTON UNIVERSITY

Mr. Chairman, I appreciate the opportunity to appear before this committee and give my views on S. 338—the Competition in Contracting Act of 1983. During the past twenty-seven years I have had the opportunity to observe both competitive and noncompetitive contracting in operation. During my Government employment with the Department of the Navy I negotiated sole source contracts for major aircraft weapons systems. Next, I worked in private industry as a Contracts Manager and Counsel. During that time I negotiated and administered both competitive and sole source contracts with defense and civilian agencies. Included in the major programs for which I had contractual responsibility was the launching equipment for the Titan I, this country's first operational ICBM. Since then, I have represented many clients on defense contract issues. At the National Law Center our courses in Government Contract Law deal with legal issues in defense and civilian procurement. In addition, the continuing education courses in our Government Contracts Program contribute to the training of Department of Defense personnel and those working within the defense industry.

Based upon my background and experience, I heartily endorse S. 338 and strongly recommend its adoption. It is my belief that this statute would aid in eliminating a large number of noncompetitive procurements and yet would permit defense officials sufficient latitude to use sole source contracts when necessary to accomplish the vital mission of the Department of Defense. First, I would like to comment on why we need a new procurement statute and then address some of the major features of S. 338.

NEED FOR STATUTE

The Armed Services Procurement Act of 1947, 10 U.S.C. § 2301 et seq. is almost 36 years old. It stated Congress' firm preference for formal advertised procurement but permitted the use of negotiated procurement if one of 17 statutory exceptions were found to exist. Since there was no significant experience with negotiated procurement at that time, no procedures were established for negotiation and for a number of years, negotiated procurement became synonymous with sole source procurement. This situation persisted until 1963, at which time the only significant modifications to the Armed Services Procurement Act were made. Those modifications tightened up on the use of negotiation and for the first time imposed a competitive requirement on negotiated contracts stating that "proposals, including price, shall be solicited from the maximum number of qualified sources consistent with the nature and requirements of the supplies or services to be procured . . ." While the use of competitive negotiation has increased since then, sole source procurement is still at an unacceptably high level. On the other end of the scale, the preference for formal advertising resulted in its improper use when competitive negotiations would have been the preferable method of contracting. Some degree of confusion still exists. Thus, there is a need for a statute which states a preference for competition, strictly limits the use of non-competitive procurement and requires that the particular mode of competition selected be that best suited for the particular procurement involved.

It has been suggested that there is no need for a statute, because the agencies can take care of this by regulation. Indeed, there has been a recent increase in regulatory activity in the competition area. Executive Order 12352, a proposed Office of Federal Procurement Policy Letter, and various Department of Defense initiatives have addressed this problem. However, experience has shown that regulations do not have the same degree of respect both within and outside the procurement agencies that statutes command and the same hand that writes the regulation can change it. It is also interesting to note that agency regulatory activity appears to vary in proportion to the degree of congressional activity.

NO DISRUPTION TO PROCUREMENT PROCESS

S. 338 does not require the use of revolutionary and untested procurement procedures, so it could be readily implemented by the Department of Defense without causing significant expense or any disruption of the procurement process. S. 338 establishes three major types of competitive procedures and gives criteria for the use of each method:

a. Sealed Bids.
b. Competitive proposals.
c. Simplified small purchases.

It specifies minimum procedures to be followed for sealed bids and competitive proposals. These procedures are practically identical to those presently required for formal advertising and negotiation. The procedures which would be used for sealed bids and competitive proposals are well known to most procurement officials and the contracting community, and have been interpreted by many court decisions along with thousands of Comptroller General decisions. For the most part, they have proved to be workable without imposing an undue burden on either the procuring agencies or the contracting community.

A major improvement contained in S. 338 would require the agencies to use the competitive procurement procedures best suited to the circumstances of each procurement. Thus, sealed bids would be used where the award could be made on the basis of low price, but competitive proposals would be used where specifications and other factors require that the award not be made based on price alone. This should result in the elimination of improper choice of procurement type. It would also eliminate the preparation and review of determinations and findings. The elimination of this non-productive effort which has grown largely into a matter of form should result in some savings.

The requirement for competition would apply to small purchases but the procedures for sealed bids or competitive proposals would not be applicable. Thus, small purchases would receive the benefit of competition but the more costly procedures justified for larger procurements would not be required. The increased cost to the executive agencies and the great burden on offerors, many of whom would be small businesses, resulting from their application would be counterproductive. The costs would by far outweigh any possible benefits.

BENEFITS OF EFFECTIVE COMPETITION

Properly conducted, competition can secure many benefits for the Government. Cost savings, technical excellence and public confidence in the operations of the Government result from a well run competitive procurement system. This is not meant to imply that all contractors working on sole source contracts are wasteful or incompetent. My own experience indicates otherwise. However, when the winning or losing of a contract is in the balance, it is interesting to see how something extra is done or conceived either to save money or furnish a better product. Recognizing these principles, S. 338 specifically requires the executive agencies to make an affirmative effort to obtain effective competition. Thus, agencies are required not only to obtain competition but to increase the quality of the competition. This is necessary in view of unsatisfactory past performance of many agencies. Opportunities for obtaining or improving competition have often been lost because of untimely, faulty or the total lack of advance procurement planning. Noncompetitive procurement or inadequate competition has also resulted many times from the failure to develop appropriate specifications or to perform adequate market surveys and identify potential sources. Some agencies have already implemented some of these reforms, but there are many opportunities for improvement. By requiring effective competition Congress will serve notice on the agencies that they will need to do more than the minimum to comply with the statute.

LIMITS ON NONCOMPETITIVE PROCUREMENT

The present statutory provisions on competitive negotiation have not been sufficient to deter the agencies from unnecessarily using noncompetitive procedures. S. 338 would for the first time make the award of a noncompetitive contract a clear violation of statute unless permitted under one of the specific and limited exceptions stated in the Act. The prohibition would apply to both large and small purchases. The exceptions are sufficiently broad to enable agencies to accomplish their missions but not so overly broad as to permit abuses.

While the six exceptions permitting noncompetitive procurement contain new statutory language, I do not believe that significant interpretational issues will result from their adoption. Comptroller General and court decisions dealing with sole source contracts under the present statute will continue to be helpful in settling questions arising under S. 338. For example, the determination to enter into a sole source contract will not be deemed improper if it is reasonable in view of the circumstances and the facts available to the procurement agency at the time the determination is made. Comptroller General and court decisions have also dealt with the question of whether a firm is solely qualified to perform a contract, thus justifying sole source procurement. The fact that the firm may offer technical or administrative advantages over others has consistently been held insufficient to justify sole source negotiation. There is no reason to expect that these and other similar rulings on sole source procurement would not continue to be applicable if S. 338 were adopted.

ADDITIONAL EXCEPTIONS

There has been some discussion of the need for additional exceptions permitting sole source pocurement. I would like to comment on two of the suggested exceptions, those for unsolicited proposals and for unanticipated circumstances.

I am opposed to the unsolicited proposal exception for the following reasons:

1. It is impractical to distinguish between true unsolicited proposals and the infamous "solicited unsolicited proposals," which in fact are suggested or requested by government personnel. H.R. 2545 attempts to resolve this by defining unsolicited proposals to exclude proposals which result from "informal agency requests." However, this would be virtually impossible to police. Most such informal requests or suggestions would take place orally and could not be documented.

2. Insufficient standards would exist to determine when the agency could use sole source procurement for unsolicited proposals. H.R. 2545 would permit such an award if the proposal "demonstrates a unique or innovative concept." "Unique" and "innovative" are not well understood and defined legal terms. As a result, too much discretion would be afforded procurement officials and abuses could easily occur. The current regulatory coverage of unsolicited proposals is far more restrictive than the coverage contained in H.R. 2545.

3. The competition exception currently in S. 338 under 10 U.S.C. 2304 (e)(1) contains sufficient basis for the sole source award of meritorious proposals. This exception provides that noncompetitive procedures may be used when the property or services are available from only one source and

no other type of property or services will satisfy the needs of the agency. Thus, the sole source procurement would be justified on the basis of the Government's need to contract with only that source and not because that source submitted an unsolicited proposal. This might be justified based on the need to take advantage of the talents and knowledge of a specific firm or because of the proprietary data or knowhow possessed by the offeror.

4. I do not believe that the absence of a specific exception for unsolicited proposals will have a significant impact on the volume of meritorious unsolicited proposals presently received by the Government. Under the present procedures there is no assurance that an unsolicited proposal will result in a sole source award and many do not. Although an argument could be made for the desirability of increasing unsolicited proposal activity, the possibility of improper use would appear to be too great to adopt such an exception.

With respect to an additional exception for unanticipated circumstances which would not fall within one of the six exceptions contained in S. 338, I would support a waiver procedure which would be controlled at a very high level and which would require an annual report by each agency to Congress of the waivers adopted. I am opposed to a "catchall" exception such as "impractical to obtain competition." Such a broad and general exception presents too great an opportunity for abuse. The waiver procedure would permit the agency the necessary latitude to assure mission success in the event that circumstances arise where one of the six exceptions in S. 338 does not apply but where sole source procurement is necessary. Further, placing the approval level at the secretarial level of each agency and not permitting delegation would limit the likelihood of abuse. Also, the annual reporting requirement would give sufficient visibility to assure Congress that abuses are not occurring.

There is a minor change that I suggest be made. On page 26, line 25, take out the word "with" and on page 27, line 1, put the comma before the word "after."

In summary I strongly urge the adoption of S. 338. It will make needed improvements and provide a sound basis for continued development of competitive procurement procedures.

Senator NUNN. Mr. Robert Rosenzweig, president of the Association of American Universities.

We are glad to have you. Senator Cohen asked for you to go ahead and proceed. He will be back in a moment.

STATEMENT OF ROBERT M. ROSENZWEIG, PRESIDENT, ASSOCIATION OF AMERICAN UNIVERSITIES

Mr. ROSENZWEIG. Mr. Chairman and members of the committee, my name is Robert Rosenzweig. I am president of the Association of American Univerities, and I appear here today on behalf of the 50 American universities that comprise that organization, as well as on behalf of the American Council on Education, the National Association of State Universities and Land Grant Colleges, and the Council on Governmental Relations. Together, those organizations represent substantially all of American higher eduaction.

I appreciate the opportunity to present our views on S. 338. I shall be brief. The concerns I wish to bring to your attention are sharply focused ones that bear on the validity of scientific research in this country.

Before I address the two specific points I wish to raise with you, let me make an observation about the bill itself. The purpose of this legislation is to bring competition to bear more widely in the procurement decisions of Government agencies. I can only applaud that purpose.

The growth of academic science in America into what is now the most vital and productive scientific enterprise in the world has rested on the proposition that the free and open competition of ideas is the most effective spur to creativity.

So long as the system of competition genuinely assures decisions based on the merits of the proposer and the proposal, and so long as proposers can be assured that their ideas will not be expropriated by others and retailed elsewhere, then open competition fits the requirements of good science.

Thus, I come before you as an advocate of the purposes of S. 338. The reason that I am here at all, since I am hardly an expert on Government procurement policy, is that S. 338 in its present form would change the rules of scientific competition in ways that would be harmful to the requirements of good science.

Since I am certain that no one intends that result, I hope it will be possible to agree on two language changes that will protect the interests of science without doing violence to the central thrust of the legislation.

UNIVERSITY UNSOLICITED RESEARCH PROPOSALS

The first suggestion I have is that agencies be permitted by the legislation to award contracts noncompetitively when "the contract to be awarded results from the acceptance of an unsolicited research proposal." This would, therefore, become an exception to the requirement for competition.

The reason for this exception lies in the fact that ideas are peculiarly vulnerable commodities. They cannot be patented or copyrighted. They are not subject to trade secret protection and so the creator of an idea is at the mercy of those whose patronage he or she seeks.

If the system is protective, then it encourages its use; if it is not, then good ideas—and the people who create them—will go elsewhere, or will simply be stifled.

Under the legislation as drafted, a research proposal put to a Government agency for the award of a contract would need to be publicized. Publication would presumably include the topic to be addressed, the hypotheses to be investigated, and perhaps the method of investigation.

Absent those, it is hard to see what the competition would be about; with those, the competition can only consist of assertions that *x*, *y*, or *z* can do the proposer's project better or cheaper. I doubt that competition of that kind is what the authors of the bill had in mind.

It is, I am afraid, true that we can honor the intellectual property rights of scientists under a system that requires conventional competitive bidding based on public solicitation. The remedy I suggest is a simple one, and I hope that the committee will adopt it.

FEDERALLY FUNDED RESEARCH AND DEVELOPMENT CENTERS [FFRDC'S]

The second suggestion I want to make is made necessary by the fact that S. 388 would eliminate the provision of current law that exempts university programs from the requirements of competitive bidding. The effect of that change would be to alter radically for the worse the way in which federally funded research and development centers [FFRDC's] would be funded.

These centers are among the jewels of American science and technology. They are responsible for a significant share of the most fundamental and advanced scientific work of which we are capable. They include in their number such outstanding centers as the Princeton Plasma Physics Laboratory, Penn State's Applied Research Laboratory, the Jet Propulsion Laboratory at Cal Tech, and the Stanford Linear Accelerator Center.

As with all research enterprises, the quality of these can be no better than the quality of the people who are attracted to their work. Good people like to work in university settings where colleagues are readily available, and their work flourishes only with the reasonable assurance of reliable funding. Their purpose is not to produce a product, but to pursue fruitful lines of inquiry. To require particular projects within these centers to be bid competitively would make no sense. To the extent that the competition were a real one, it would suffer the general defect I described earlier, and it would introduce a corroding element of uncertainty into the direction of large programs of research; to the extent that the competition were pro forma, it would waste time and simply be unworthy of a serious government.

In fact, it is hard to see what purpose is served by adding the requirement for competition to research in these centers. The quality of science will not be improved; on the contrary, the added paperwork and uncertainty that the change would produce would dilute scientific effort. Other "vendors" would not be created or encouraged by such a move. Indeed, merely to use the term "vendor" suggests the inappropriateness of the concept.

No problem would be solved by the change, and no wrong would be righted. Just the opposite: Problems would be created and what is right would be made wrong. The protection we seek is easily provided. We suggest that the third of the exceptions allowing noncompetitive procedures be amended to read as follows:

> An executive agency may use noncompetitive procedures (only) when it is necessary to award the contract to a source or sources in order to maintain an essential industrial, research, or technical capability in the United States or to achieve national industrial mobilization; . . .

Adding the new language would give agency officials sufficient latitude to assure FFRDC's of their ability to develop coherent research programs with reasonable continuity of funding.

I hope that the committee will accept these amendments. They would avert serious damage to scientific research in our universities, an enterprise on which so much else depends in this complicated world.

Thank you, Mr. Chairman.

I will be pleased to answer your questions.

Senator NUNN. I know Senator Cohen has several questions and he is coming back. I think rather than disrupt the continuity of questioning I will just ask for a recess now until he gets back.

Thank you very much.

[Recess.]

Senator COHEN. As I understand it, your major concern is that under this bill, unsolicited research projects, if they are required to be subjected to competition, would result in the disclosure of original thoughts, innovative solutions, and other proprietary information.

Is that correct?

Mr. Rosenzweig. Yes.

Senator Cohen. Is it possible to fashion this legislation to accommodate your concern without a wholesale exemption or exception for research projects?

GAO has made one recommendation.

Mr. Rosenzweig. I don't think it does the trick, as I recall. I haven't thought of a way, my colleagues have not thought of a way that satisfactorily protects against the defects we see.

I guess where I start from is, in the area of research. I don't see an abuse that needs to be corrected. I don't speak to the rest of the substance of procurement, but in this area it seems to me that we would be trading a good and productive system, which if it has been abused, it has been in relatively negligible ways, for a new system that would be, I would argue, less good and less productive and that would be a bad trade.

Senator Cohen. What about so-called "solicited-unsolicited" requests for research projects? Have you come in contact where Government agencies informally through conversations make a judgment that perhaps it might be an appropriate area for you to submit a proposal?

Mr. Rosenzweig. A good contracting officer in research will always be talking with the scientists in his field and a lot of ideas are generated that way. I don't think you want to close off that line of communication.

I don't think that it is a practice that discourages others from generating research proposals. I don't see it is a defect that needs to be corrected.

Senator Cohen. Actually, if you had a "solicited-unsolicited" proposal, wouldn't that violate existing rules?

Mr. Rosenzweig. I am not certain of that.

Senator Cohen. If it were impossible to conduct a market search without disclosing this innovative and unique information, GAO recommends that S. 338 should be amended to exempt such a proposal from the Commerce Business Daily notice requirement?

Mr. Rosenzweig. It would be better than the present language.

Senator Cohen. You could award the contract based on the first exemption, namely where only one source is available and there are no competitive alternatives.

Mr. Rosenzweig. The question I keep coming back to is what is it in aid of, what illness is being cured by the proposal as it applies to research?

Senator Cohen. According to a GAO report in 1982, of 198 contracts reviewed between Government agencies and educational institutions, 32 were based on unsolicited proposals. They concluded that competition was feasible and should have been sought for 20 of those 32 contracts.

Really, the emphasis is to get competition. They found 20 out of 32 contracts which could have been competed. It seems to me that an overriding policy objective of this Government should be to do that.

Mr. Rosenzweig. I admit, Senator, I have not read the report so I can't judge the quality of the judgment they have made about specific proposals. Really I think the problem that we are all trying to get around is that contracts are not very good instruments for supporting research in universities. We have known that for 30 years now.

Most sponsored research in universities supported by the use of grants, primarily through NIH and the National Science Foundation, and the Department of Defense and other agencies have not used grants. They have typically used contracting as the instrument and it has worked because of the flexibility with which they have used the contract.

You don't buy research, you are not buying a product, you are buying somebody's ideas and somebody's notions of how to go about finding new information or generating new understanding. That is not like a bomber system or some other typical procurement instrument.

So we are making adaptations and trying to behave in a common sense way in a situation in which the instrument is not ideally tailored to its objective.

Senator COHEN. Buying research you are applying only to educational institutions?

Mr. ROSENZWEIG. That is right.

Senator COHEN. So if you have exemption, you would confine it to educational institutions.

Mr. ROSENZWEIG. Yes.

Senator COHEN. What if those educational institutions also receive grants and assistance from major contractors?

Mr. ROSENZWEIG. I don't know how common that is. In my experience it is not very common.

Senator COHEN. Those are all the questions I have. If we have further questions, we will ask you to answer them in writing for the record.

Thank you very much.

Mr. ROSENZWEIG. Thank you, Mr. Chairman.

Senator COHEN. Our final witness is Bruce Hahn, Manager of Government Affairs of the National Tooling and Machining Association [NTMA].

Why don't you begin as quickly as you can and summarize your statement so we may have 5 or 10 minutes before the bell goes off.

Senator Quayle is here and I will yield to him to ask questions.

STATEMENT OF BRUCE HAHN, MANAGER OF GOVERNMENT AFFAIRS OF THE NATIONAL TOOLING AND MACHINING ASSOCIATION (NTMA), ACCOMPANIED BY PAUL SEIDMAN, SPECIAL COUNSEL TO THE ASSOCIATION

Mr. HAHN. Thank you, Mr. Chairman. My name is Bruce Hahn, Manager of Government Affairs at NTMA. With me is Paul Seidman. Mr. Seidman was formerly chief counsel for advocacy in SBA and a former Navy procurement lawyer.

Our members are 14,000 companies who manufacture or are responsible for the manufacture of virtually anything that is produced in the country today. They do the tooling, machining and all the complex procedures to enable modern manufacturing as we know it.

They support every industry from automotive to defense. They do a lot of defense work right now. Unfortunately they do it as subcontractors because due to artificial barriers to competition they are not able to do it as prime contractors.

We are also testifying on behalf of 44 member associations of the Small Business Legislative Council and approximately another 150 associations whose members are predominately small business.

We strongly support the goals of your legislation, Senator Cohen. You and Senator Levin are to be commended for your hard work in this area and we very much appreciate it.

We are concerned, however, that the legislation does not go far enough in addressing the problems in procurement and particularly those problems in procurement in the Department of Defense.

Senator COHEN. I note this is a nice point-counterpoint because DOD has suggested that we have gone too far.

Mr. HAHN. How an organization that competes 10 percent of its spare parts purchases can be 99 and 4/100ths percent pure as stated by Secretary Gilleece I have never been able to figure out. We believe in some areas of procurement subjective factors are justified. When you are procuring skilled services, architectural designs, and so forth, or deciding on a major prime system contract where you have subjective considerations such as different technical approaches, there is excuse for other than pure competition.

That does not hold true in the area of spare parts procurement and that is the area I am going to address today. That is a $13 billion market, less than 10 percent of which is procured by open competition.

A spare part is something that is represented on blueprints that any company and thousands of our members in Indiana, your State, and everywhere can produce. They can look at the blueprint and can match exactly those specifications and the materials called for. We believe there is no excuse for 90 percent of spare parts being procured by DOD on less than an open competitive basis.

S. 338 RELAXES THE DEGREE OF COMPETITION REQUIRED

The first that we see in S. 338 that might lead to less competition is relaxing the present requirement that contract officials obtain maximum practicable competition when competition is mandated. S. 338 would require contracting officials to obtain only "effective competition" which as further defined as merely soliciting from more than one source.

There was a DOD witness on April 19 House Armed Services hearings who had discussed the problems they had when they tried to get a small subcontractor who produced the part for a prime to bid against the prime for that part. The small companies won't do it because that is their biggest customer.

The word gets out and the subcontractor gets a phone call and decides not to bid against the prime. So, if you lower the standard to a standard where conceivably only two bids could be taken, you open the door for this kind of abuse to continue.

S. 338 CREATES NEW GROUNDS FOR NONCOMPETITIVE PROCUREMENT

We also see another problem in that it would give DOD procurement officials new statutory grounds for noncompetitive procurements which are inappropriate in legislation aimed at increasing competition.

There is a chart that compares the grounds for noncompetitive procurement under current law to the grounds in S. 338 which appears as an appendix to our statement. I direct you to that.

S. 338 WEAKENS PREFERENCE FOR FORMAL ADVERTISING

S. 338 also weakens the statutory preference for formal advertising in the procurement of standardized products, a procurement method aimed at obtaining the Government's needs at the lowest cost and eliminating favoritism and collusion.

S. 338 DOES NOT DEAL WITH BARRIERS TO COMPETITION

In addition, we feel that S. 338 misses the opportunity to deal with barriers to competition such as (1) bidder and product prequalification, (2) inadequate and untimely notification of procurement actions, and (3) lack of access to technical data packages needed for competitive procurement.

We recommend that this legislation or additional legislation address these problems because of the fact that only 10 percent of DOD spare parts procurements are competitive. I am sure you are familiar with the SBA study, GAO study, internal Air Force and Navy studies as to what happens when they take these sole-source procurements and put them out to competition. It is fairly consistent. They save 50 percent, they reduce lead times often by more than half at tremendous savings to the Federal Government. When you are talking about 50 percent savings on a $13 billion market, even though you would have unquestionably added manhour cost, the economics work well in your favor.

Let me address a couple of these quickly.

Senator COHEN. You just cited GAO. What happens if they don't have competition? Are you aware GAO did, in fact, recommend that we raise competitive negotiations to the same status as formal advertising?

Mr. HAHN. In the sense they be formally advertised as well?

Senator COHEN. No. You can have competition through competitively negotiated contracts as well as formal advertising.

Mr. HAHN. One of the problems in the negotiated method is that if someone wishes to subvert the process, you can solicit round after round of best of final offer, until you give the job to the one you want it to go to.

We believe the maximum practicable competition—incidentally, we don't have any argument with the point made by the former witness. We are not suggesting that necessarily means 100 companies bidding for a $60,000 job. You can use rotating bidders' lists or some feature such as that to make sure it is not an economically unsound procedure.

Senator COHEN. What would be the logical conclusion if everything would have to be formally advertised?

Mr. **Seidman**. We are not saying that everything should be formally advertised.

If you have adequate specification for an item and price is the only factor, there is no reason for not formally advertising it.

Senator **Cohen**. If price is not the only factor?

Mr. **Seidman**. If price is not the only factor, you do have to use the negotiated method. What we are talking about is the quality of competition.

Senator **Cohen**. What S. 338 is designed to do is to say when price is the only factor, agencies should formally advertise. When it is not the only factor, you have competitive negotiations and both are on the same level, on a par in terms of competition.

Mr. **Seidman**. What it does is do away with the justification requirement—the requirement to have a written determination and finding justifying the use of the negotiated method.

If contracting officials want to steer a competitive contract, it is much easier for them to do utilizing the negotiated method because of subjective factors other than price and the abuse of soliciting multiple rounds of best and final offers until the source they want is the apparent successful offeror.

Senator **Cohen**. I am pleased to point out DOD objects to our inclusion of formal advertising in S. 338.

Mr. **Hahn**. We recognize that.

Senator **Quayle**. Let me interject something that is of concern to me.

I think you have gone a longer way to construct the middle ground than I have in trying to create competition. As Mr. Hahn points out, less than 10 percent of a $13 billion industry goes by competition. That is a pretty redeeming statistic.

My understanding is that this bill would not, at least the language in it would not, get into trying to get more competition and particularly in the spare parts industry—which is a fairly significant industry. This is the intent of the bill.

You can do it in the original procurement, but in the spare parts, from my understanding of it, we ought to take a second look at it and see if there is not some other language. I am not wedded to any particular language.

I just think there is a problem that we are probably not addressing by this. This is the reason that they are here and the reason I am interested in it. It goes to that particular factor that in spare parts you have 90 percent sole source.

I would imagine any kind of analysis you will find out that it is not competitive, and we are probably losing a lot of money.

Senator **Cohen**. Go back to your major point. I think you wanted to read through my exemptions. We have six exemptions. You want to take it down to four; is that correct?

Mr. **Hahn**. Can I finish with the argument I was about to lay out, then let us address that?

Senator **Cohen**. Sure.

BIDDER AND PRODUCT PREQUALIFICATION AS A BARRIER TO COMPETITION

Mr. **Hahn**. One of the areas it does not address is the area of bidder and product prequalification. The Department of Defense has a bidder and product prequalification system, which is a large contributor to the net result of only 10 percent of spare parts contracts being openly competed.

Bidder lists are used for private industry. They will examine their suppliers and say OK, this guy is cut out to make this kind of product for us. This guy is cut out to make this other type of product. That type of an application of bidder lists is not a problem.

However, it is used by the DOD as a means to exclude competition. The qualified bidders' lists are all hard to get on. A lot of companies that make the part as a subcontractor for a prime can't get on the list to make the part that they are already making.

The same thing with the qualified products lists. It is awful hard to get on. It is just another barrier to competition. DOD's rationale is that this is quality control. Quality control is a science. Quality control is a matter of testing, taking samples randomly, determining what percentage conform to standards and based on that either rejecting or accepting, depending on what your standards are.

The more critical that part, the tougher the standard. We don't argue with that. That is practiced by DOD and should be. That is the main essential of quality control. Furthermore as stated in a DOD study qualified products lists provide little assurance of conformance. The fact that a handmade prototype meets applicable requirements provides no assurance that a mass produced version will.

We would suggest that this has been abused to such an extent that this committee should consider legislating the bidder and product prequalification system right out of existence.

UNAVAILABLE AND INADEQUATE TECHNICAL DATA AS A BARRIER TO COMPETITION

Another problem is lack of technical data or unavailability of technical data. One of the reasons that it is unavailable is very often the Department of Defense doesn't buy rights to the data.

We think the Department of Defense should buy rights to the data in every case even if part of those data rights—and this is probably not often the case—but if part of the data rights apply to commercial products, buy them for use and pay a fair price for use in Government applications.

It might be argued that this raises the price, but I don't think it would raise the price very much because the data has to be developed to fulfill the contracts.

The Department of Defense is in a very good position as far as leverage goes to insist on buying the data. Yet, very often the data is not bought. When the data is not bought it remains proprietary, then DOD has no choice but to go back to the company, the original sole source, and buy replacement parts from them at whatever price they want to charge.

There have been some startling revelations as to what kind of increases can result from this.

Another problem which has been conceded by a number of the branches is that they don't even know what data they have. Bidders will go in wanting a technical data package. The services will say, "We don't have it."

"Where is it?"

"We don't know where it is."

They don't know if they have the data to put the parts out for open bid in many cases. We think something is needed to force them to organize their data so that it can be accessed and used for competitive procurement.

This was done with GSA a few years ago when GSA did not know what furniture was owned by the Government. Now there is a system whereby GSA keeps track of their property.

We suggest, given the amount of expenditures in spare parts alone, a similar procedure should be started for the Department of Defense.

Another problem is sole-source procurement resulting from prime contractors' marking all data as proprietary even when it is sold to the Government. As documented in recent Inspector General reports the services have not aggressively asserted Government rights in data. We believe that such spurious claims of confidentiality should be referred to the Justice Department for prosecution under the False Claims Act.

These are the three areas we feel should be addressed either in addition to your legislation or in separate legislation.

Thank you.

[The prepared statement of Mr. Hahn follows:]

PREPARED STATEMENT BY MR. BRUCE HAHN, MANAGER OF GOVERNMENT AFFAIRS OF THE NATIONAL TOOLING AND MACHINING ASSOCIATION

Mr. Chairman and Members of the Committee:

Good afternoon. My name is Bruce Hahn, Manager of Government Affairs of the National Tooling and Machining Association (NTMA). With me is Paul J. Seidman, special counsel to the Association.

NTMA represents the tool, die, and precision machining industry. This industry is composed of 14,000 plants, almost all of which are small business concerns. These companies build special tools, dies, jigs, fixtures, gauges, special machines (automation, robotics, and production lines), and precision machined parts or components. They use a wide variety of equipment and processes, including most machine tools from the simplest lathe to complex electrical-chemical milling, and electron-beam welding. They commonly achieve tolerances to one ten-thousandth of an inch and regularly use computers as an aid in design, machining, and control of operations. Our members produce many of the parts purchased by the Department of Defense, usually as subcontractors. They have the capability of producing virtually any part the Department of Defense procures.

We are also testifying on behalf of 44 member associations of the Small Business Legislative Council, whose members represent nearly 4.5 million small business units covering almost the full range of S.I.C. classification. A large number of non-affiliated business associations also support competitive procurement. The list of SBLC and the non-affiliated small business supporters is attached.

I. Background

We strongly support the goals of increased competition in federal contracting. Senator Cohen and Senator Levin have our greatest appreciation for their efforts in crafting this legislation.

Several years have gone into their efforts and they have contacted and received input from a wide variety of sources. Unfortunately, our coalition was just beginning to organize at the beginning of this Congress and the legislation had already been introduced before we were able to make the sponsors aware of our concerns. The federal government procures both goods and services from the private sector. In many cases, the procurement of either involves subjective factors, as when professional services such as engineering or architectural designs are being considered. When such qualitative factors exist, there may be good reason to impose some reasonable limits on competition, such as the use of the negotiated method. In other cases, such as the $13 billion annual spare parts market, all suppliers are quoting on precisely the identical product, and there is no reason to limit competition.

It is the latter situation which concerns us in S. 338. Presently less than 10 percent of the total annual purchases of spare parts by the Department of Defense are procured competitively. Yet study after study has demonstrated that when these parts are broken out to competition the result is savings on the magnitude of 50 percent and drastically reduced leadtimes. Yet, the Department of Defense continues to discourage competition. The new proposed breakout regulation, supposedly designed to encourage competition, contains a 69-step set of procedures that must be surmounted before a part can be put out for open competition.

II. Potential Pitfalls in S. 338

Several parts in S. 338 may have the unintended result of restricting rather than encouraging competition in the procurement of goods. It could exacerbate the problem by 1) relaxing the requirement that contracting officials obtain "maximum practicable competition" when competition is mandated. S. 338 would require only "effective competition' which is defined as soliciting more than one source. In many cases where a number of solicitations are required under current law, this substitution would allow compliance with as few as two sources. As was explained by a DOD representative testifying before the House Armed Services Committee recently, this often means competition between only the prime and the subcontractor who makes the part. As the witness observed, the subcontractors are understandably unwilling to be the only bidder against their biggest customer.[*] 2) It gives DOD procurement officials new statutory grounds for non-competitive procurements, which are inappropriate in legislation aimed at increasing competition. A chart comparing the grounds for non-competitive procurement under S. 338 as compared to existing law is attached. 3) It weakens the statutory preference for formal advertising in the procurement of standardized products, a procurement method aimed at obtaining the government's needs at the lowest cost and eliminating favoritism and collusion. In addition, we feel that S. 338 misses the opportunity to deal with barriers to competition such as 1) bidder and product prequalification, 2) inadequate and untimely notification of procurement actions, and 3) lack of access to technical data packages needed for competitive procurement. With respect to the first three points, we believe that relatively simple modifications can be made to the legislation which would eliminate the potential for abuse while enhancing the thrust of the legislation. Those recommended changes and an explanation are attached to our testimony.

III. S. 338 Should Address Barriers to Competitive Procurement

We also suggest that you consider, either as an amendment to S. 338 or as separate legislation, language which would get at the real barriers to competitive procurement. These include bidder prequalification, inadequate notification of procurements, lack of technical data, and failure to publish proposed rules affecting competition in the Federal Register. In the spare parts area alone, a market of some $12 billion annually, there is consistent evidence that these anti-competitive practices are costing billions of dollars each year only because the procurements are not competitive. Study after study has shown that the average cost savings is 50 percent when you go from sole source to competitive procurement. In addition, lead times are drastically reduced when parts are openly competed, no small consideration in a time when some aircraft are being canabalized in order to keep others flying. Yet, despite this, the Air Force, perhaps the biggest consumer of spare parts, procures less than 10 percent through open competition. Why?

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[*] Under existing law, contracting officials are required to obtain "maximum practicable competition." DAR 1-300.1 and 3-101.(d). This regulatory requirement is present in the statutory preference for formal advertising (10 U.S.C. Section 2304(a)) and statutory requirement that proposals "shall be solicited from the maximum number of qualified sources." 10 U.S.C. Section 2304(g).

The retreat from the present "maximum practicable competition" standard to "effective competition" and requiring only soliciting more than one source is similar to the less-stringent requirement of obtaining "reasonable competition" now limited to small purchases. NTMA believes that it would be harmful to extend this less-stringent standard of competition to larger purchases. It would permit contracting officials to disguise de facto sole source procurements as competitive procurements by "competing" a requirement between a pre-selected source and another firm selected only to provide the appearance of competition.

A. Bidder and Product Prequalification

The services cite the need for quality assurance in critical parts, a point none of us argue with. They point out that their product and bidder prequalification systems are a means to assure that they have reliable bidders who will turn out quality products. In their opinion, there apparently aren't too many qualified companies, given the paltry 10 percent competitive procurement rates.

We disagree with these procedures. Their effect has been to restrict competition and any quality control aspects are incidental. The science of quality control, as it is practiced in private industry in this country and everywhere else but the Department of Defense, is a mathematical science based on probabilities. If you take three samples out of a lot of 100 and test their dimensions with measuring devices and composition by chemical or mechanical means, you can determine the probability of the remainder being correct. If a higher level of confidence is desired, you can test a higher percentage of parts and if 100 percent assurance is needed, you can test 100 percent of the parts. If these quality control procedures reveal the product meets the standards, then it is good, and if it does not, it should be rejected. Other than a visit to a low bidder to insure that they have the right equipment and satisfactory manpower, no other subjective methods of quality control are needed. This is quality control and has nothing to do with qualified bidders lists, qualified parts lists, or any other artificial barriers to competition. If this sort of quality control is being practiced, such prequalifications are redundant and unnecessary. One of the best ways to increase competition and save perhaps $5-$6 billion annually without affecting total procurements would be to legislate these artificial barriers to competition out of existence. We would be happy to work with any members of the committee interested in such a project.

B. Unavailable Technical Data

In addition, several improvements must be made with respect to data rights. The Department of Defense should not enter into a contract without buying all rights to data, including the use of proprietary data for use in competitive defense procurements only. Given the leverage of the federal government, we cannot imagine a contractor declining a major contract because of such a clause. Nor can we imagine that it could have an appreciable effect on the total cost of a contract since in most cases almost all the data had to be generated to fulfill the contract anyway. Even if the initial procurement costs might be a little higher, they would reflect the true cost of the system and would pale by comparison to the savings which could be achieved from the competitive procurement of replacement parts.

We also are concerned about enforcement of government data rights. At recent House Armed Services Committee hearings, a DOD representative admitted that the service branches had not been aggressive in asserting rights to government-owned data. We believe that the Department of Defense should monitor this more closely, correcting mis-labled data packages. If patterns emerge that suggest a possible intentional false claim of proprietary rights, they should be referred to the Department of Justice for review as possible violations of the False Claims Act.

Finally, a frequent problem is lack of data. This lack of data prevents competitive bids in a large percentage of procurements each year. Simply put, the Department of Defense often does not know what data it has, or should have, nor where it is stored. When similar problems were revealed several years ago in terms of GSA knowledge of its own holdings of office furniture and other property, Congress directed an identification system, in place today, which has greatly reduced waste in that area of procurement. We suggest that this Committee consider a similar directive to the Department of Defense and the service branches.

Thank you Mr. Chairman and Members of the Committee. We would be happy to answer any questions you might have.

# # #

Below is a listing of Small Business Legislative Council and non-affiliated small business supporters.

The position paper -- Small Business Procurement Policy and Innovation -- is supported, as of this date, by 43 members of the Small Business Legislative Council.

American Association of Nurserymen
Washington, D.C.

American Textile Machinery Association
Washington, D.C.

Association of Diesel Specialists
Kansas City, Missouri

Association of Independent Corrugated Converters
Washington, D.C.

Association of Physical Fitness Centers
Bethesda, Maryland

Automotive Warehouse Distributors Association, Inc.
Washington, D.C.

Building Service Contractors Association International
McLean, Virginia

Business Advertising Council
Cincinnati, Ohio

Direct Selling Association
Washington, D.C.

Electronic Representatives Association
Chicago, Illinois

Furniture Rental Association of
Washington, D.C.

Independent Bakers Association
Washington, D.C.

Independent Business Association of Michigan
Kalamazoo, Michigan

American Metal Stamping Association
Richmond Heights, Ohio

Independent Sewing Machine Dealers of America
Hilliard, Ohio

Institute of Certified Business Counselors
Lafayette, California

International Franchise Association
Washington, D.C.

Local and Short Haul Carriers National Conference
Washington, D.C.

Machinery Dealers National Association
Silver Spring, Maryland

Manufacturers Agents National Association
Irvine, California

Marking Device Association
Evanston, Illinois

Meanswear Retailers of America
Washington, D.C.

National Association for Child
Care Management
Washington, D.C.

National Association of Brick Distributors
McLean, Virginia

National Association of Plastics
Distributors, Inc.
Jaffrey, New Hampshire

National Association of Retail Druggists
Washington, D.C.

National Beer Wholesalers' Association
of America, Inc.
Falls Church, Virginia

National Burglar & Fire Alarm
Association
Washington, D.C.

National Coffee Service Association
Chicago, Illinois

National Electical Contractors
Association, Inc.
Washington, D.C.

National Family Business Council
Washington, D.C.

National Home Furnishings Association
Washington, D.C.

National Home Improvement Council
New York, New York

National Independent Dairies Association
Washington, D.C.

National Meat Association
Washington, D.C.

National Office Machine Dealers
Association, Inc.
Zanesville, Ohio

National Office Products Association
Alexandria, Virginia

National Paper Trade Association, Inc.
New York, New York

National Patent Council, Inc.
Arlington, Virginia

National Pest Control Association
Vienna, Virginia

National Small Business Association
Washington, D.C.

National Tire Dealers & Retreaders
Association, Inc.
Washington, D.C.

American Association of MESBICs
Washington, D.C.

Unaffiliated Associations

National Association of Wholesaler-Distributors
Washington, DC

National Federation of Independent Business
Washington, DC

Door and Hardware Institute
McLean, VA

Smaller Business Association of New England
Waltham, MA

Small Business United
Washington, DC

Chicago Association of Commerce & Industry
Chicago, IL

Cincinnati Institute for Small Enterprises
Cincinnati, OH

Council of Smaller Enterprises
Cleveland, OH

Georgia Small Business Council

Independent Business Association of Illinois

Independent Business Association of Michigan

Independent Business Association of Minnesota

Independent Business Association of Wisconsin

Mid-Continent Small Business United

Mountain States Association

New York State Independent Business Association

Ohio Small Business Coalition

Small Business Council
San Antonio, TX

Small Business United
West Virginia

Smaller Manufacturers Council
Pittsburgh, PA

Toledo Area Small Business Association
Toledo, OH

United Federation of Small Business
California

Utah Council of Small Business

ADDENDUM TO LIST OF UNAFFILIATED ASSOCIATIONS:

National Council for Industrial Innovation

National Small Business Government Contractors Association

National Association of Women Government Contractors

National Federation of Independent Business

National Wholesaler-Distributor Organizations
Affiliated with the National Association of Wholesaler-Distributors

Air-conditioning & Refrigeration Wholesalers
American Dental Trade Association
American Jewelry Distributors Association
American Machine Tool Distributors' Association
American Supply Association
American Surgical Trade Association
American Traffic Services Association
American Veterinary Distributors Association
Appliance Parts Distributors Association, Inc.
Associated Equipment Distributors
Association of Footwear Distributors
Association of Steel Distributors
Automotive Service Industry Association
Aviation Distributors & Manufacturers Association

Bearing Specialists Association
Beauty & Barber Supply Institute, Inc.
Bicycle Wholesale Distributors Association, Inc.
Biscuit & Cracker Distributors Association

Ceramic Tile Distributors Association
Ceramics Distributors of America
Coated Abrasives Fabricators Association
Cooperative Food Distributors of America
Copper & Brass Servicenter Association
Council for Periodical Distributors Association
Council of Wholesale Distributors
  American Institute of Kitchen Dealers

Distributors Council, Inc.
Door & Hardware Institute
Drug Wholesalers Association

Electrical-Electronics Materials Distributors Assn.
Explosive Distributors Association, Inc.

Farm Equipment Wholesalers Association
Flat Glass Marketing Association
Fluid Power Distributors Association, Inc.
Food Industries Suppliers Association
Foodservice Equipment Distributors Association

General Merchandise Distributors Council

Hobby Industry Association of America

Independent Medical Distributors Association
The Irrigation Association
Institutional & Service Textile Distributors
  Association, Inc.
International Ceramic Association

Machinery Dealers National Association
Mass Merchandising Distributors Association
Material Handling Equipment Distribution Association
Monument Builders of North America-Wholesale Div.
Motorcycle Industry Council
Music Distributors Association

National-American Wholesale Grocers' Association
National Appliance Parts Suppliers Association
National Association of Aluminum Distributors
National Association of Chemical Distributors
National Association of Container Distributors
National Association of Decorative Fabric Distributors
National Association of Electrical Distributors
National Association of Fire Equipment Distributors
National Association of Floor Covering Distributors
National Association of Manufacturing Opticians
National Association of Marine Services, Inc.
National Association of Meat Purveyors
National Association of Plastics Distributors
National Association of Recording Merchandisers, Inc.
National Association of Service Merchandising
National Association of Sporting Goods Wholesalers
National Association of Textile & Apparel Distributors
National Association of Tobacco Distributors
National Association of Writing Instrument Distributors
National Beer Wholesalers Association
National Building Material Distributors Association
National Business Forms Association
National Candy Wholesalers Association
National Commercial Refrigeration Sales Association
National Electronic Distributors Association
National Fastener Distributors Association
National Food Distributors Association
National Frozen Food Association
National Independent Bank Equipment Suppliers Assn.
National Industrial Belting Association
National Industrial Glove Distributors Association
National Lawn & Garden Distributors Association
National Locksmiths' Suppliers Association
National Marine Distributors Association
National Paint Distributors, Inc.
National Paper Trade Association, Inc.
National Plastercraft Association
National Sash & Door Jobbers Association
National School Supply & Equipment Association
National Solid Wastes Management Association
National & Southern Industrial Distributors Associations
National Spa and Pool Institute
National Truck Equipment Association
National Welding Supply Association
National Wheel & Rim Association
National Wholesale Druggists' Association
National Wholesale Furniture Association
National Wholesale Hardware Association
Northamerican Heating & Airconditioning Wholesalers
North American Wholesale Lumber Association, Inc.

Optical Laboratories Association
Outdoor Power Equipment Distributors Association

Pet Industry Distributors Association
Petroleum Equipment Institute
Power Transmission Distributors Association, Inc.

Safety Equipment Distributors Association, Inc.
Scaffold Industry Association
Shoe Service Institute of America
Specialty Tools & Fasteners Distributors Association
Spring Service Association
Steel Service Center Institute

Textile Care Allied Trades Association
Toy Wholesalers' Association of America

United Pesticide Formulators & Distributors Association

Wallcovering Distributors Association
Warehouse Distributors Association for
  Leisure & Mobile Products
Watch Materials & Jewelry Distributors Association
Water and Sewer Distributors Association
Wholesale Florists & Florist Suppliers of America
Wholesale Stationers' Association, Inc.
Wine & Spirits Wholesalers of America, Inc.
Wood Heating Alliance
Woodworking Machinery Distributors Association

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June 1, 1983

COMPARISON OF PROPOSED COMPETITION IN CONTRACTING LEGISLATION (S. 338 and H.R. 2545) WITH EXISTING LAW

Introduction

This past session has seen the introduction of Competition in Contracting Legislation in the form of S. 338 in the Senate and H.R. 2545 in the House. S. 338 was reported out of the Senate Government Affairs Committee on March 17, 1983. It has been referred to the Senate Armed Services Committee, which has until June 30 to consider the defense-related portions. The Senate Armed Services Committee is scheduled to hold hearings on S. 338 on June 7. H.R. 2545, which was introduced by Congressman Price, has been referred to the House Armed Services Committee. The House Armed Services Committee has already held hearings.

One wonders if these bills are appropriately named since, if enacted, they would appear to restrict rather than encourage competition. More specifically, they would: (1) weaken the statutory preference for formal advertising, (2) create new statutory exceptions permitting noncompetitive procurements, and (3) require less stringent competition when competition is mandated. These matters are discussed in detail below.

I. Preference for Formal Advertising

A. Formal Advertising Defined -- Formal advertising is the mode of procurement requiring the solicitation of sealed bids, public opening and award to the lowest responsive and responsible bidder.

B. Existing Law -- Formal advertising required unless circumstances:

1. make formal advertising not feasible and

2. fall within a statutory exception permitting the use of the negotiated method. 10 U.S.C. section 2304(a); 41 U.S.C. section 252(c).

C. S. 338:

1. formal advertising required where feasible (adequate time, award based on price, not necessary to conduct discussions, more than one source).

D. H.R. 2545:

1. no preference for formal advertising or sealed bid approach;

2. in determining method to be used head of agency required to consider whether (a) award to be made on basis of price alone, (b) necessity of discussions, and (c) other appropriate matters.

II. Exception to Requirement of Obtaining Competition

Grounds	Existing Law	S. 338	H.R. 2545
1. Technical needs of agency	X	X	X
2. Urgency	X	X	X
3. Inadequate data or specifications	X	X	X
4. Mobilization source	X	X	X
5. Authorized by statute	X	X	X
6. Disclosure of need would jeopardize national security	Grounds for use of negotiated method under existing statutes but not for a sole source procurement. No case law on use as justification for sole source procurement	X	X

Grounds	Existing Law	S. 338	H.R. 2545
7. At the direction of a foreign government buyer	Presently justified by regulation, DAR 6-1307, but not statute, See Albed Repair Service, Inc., B-207629, 82-2 CPD 541	X	X
8. Technical or special property for which competition likely to be more costly			X
9. Noncompetitive procurement deemed necessary and in public interest by head of agency		—	X

III. Degree of Competition Required

A. Existing Law -- "maximum practicable competition"

1. Statutory Basis

a. preference for formal advertising. 10 U.S.C. section 2404(a); 41 U.S.C. section 252(c).

b. proposals "shall be solicited from maximum number of qualified sources" 10 U.S.C. section 2304(g).

2. Regulations DAR 1-300.1 and 3-101.(b); FPR 1-1.301-1 and 1-3.101(c)

B. S. 338

1. "competitive procedures" defined as "pro-

cedures under which an executive agency enters into a contract after soliciting sealed bids or competitive proposals from more than one source that is capable of satisfying the needs of the executive agency. Sections 101(a) and 201(a).

2. requires "effective competition" Sections 101(a) and 201(a).

3. retreat from present "maximum practicable competition" standard to "effective competition" and requiring only soliciting more than one source is similar to the less stringent requirement of obtaining "reasonable competition" which is now limited to small purchases.

C. H.R. 2545

1. "competitive procedure" defined as either (a) the use of formal advertising or (b) negotiated procurements where more than one source is solicited. Section 4.

2. requires "effective and efficient competition."

3. retreat from present "maximum practicable competition" standard to "effective competition" and requiring only soliciting more than one source is similar to the less stringent requirement of obtaining "reasonable competition" which is now limited to small purchases.

IV. Applicability of Proposed Legislation

A. S. 338 Applicable to Defense and Civilian Agency Procurement

B. H.R. 2545 Applicable to Defense Procurement Only

Conclusion

The so-called Competition in Contracting Legislation would likely decrease competitive procurements. If Congress is interested in enacting legislation that would increase competitive procurements, it should instead enact legislation eliminating barriers to competitive procurement such as inadequate notification of procurement opportunities, bidder and product prequalification, and inadequate data packages.

PROPOSED SENATE ARMED SERVICES COMMITTEE AMENDMENTS TO S. 338

I. S. 338 Section 201(a)

A. Proposed Amendments to 10 U.S.C. Section 2302*

1. Amendments

a. The language after the word "from" in 10 U.S.C. section 2302(3) is deleted and replaced by "the maximum number of qualified sources consistent with the nature and requirement of the supplies and services to be procured."

b. A new 10 U.S.C. section 2302 (5) and (6) are added and the existing 10 U:S.C. section 2302 (6) defining small purchases renumbered as subsection (7). The new subsections (5) and (6) provide as follows:

(5) "Competitive Proposal Method" means competitive procurement other than by the sealed bid method.

(6) "Sealed Bid Method" means advertising as prescribed by section 2305(b)(3) of this title.

2. Explanation

(a) S. 338 defines competition as soliciting from more than one source. This is a lower standard of competition than in existing law and could lead to abuses by DOD personnel. The amendment to S. 338 substitutes the more stringent standard of competition presently embodied in 10 U.S.C. section 2304(g).

The need for this amendment is highlighted in April, 1983, hearings before the House Armed Services Committee. The hearings focused on repricing abuses resulting from noncompetitive procurements of aircraft spare parts. Defense Logistics Agency personnel testified that allowing a prime contractor and its subcontractor who actually manufactured the part to bid on the same item was not competition because of duress exercised by the prime over its subcontractor. In addition, the existing S. 338 language would permit contracting officials to disguise *de facto* sole source procurements as competitive procurements by "competing" a procurement between a pre-selected source and another firm selected only to provide the appearance of competitive procurement.

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* All citations to 10 U.S.C. are to the proposed 10 U.S.C. sections in S. 338 referred to the Committee on Armed Services pursuant to the order of February 2, 1983.

(b) New subsections (5) and (6) are added to the S. 338 version of 10 U.S.C. section 2302 because it reads better if the "competitive proposal method" "and sealed bid method" are defined at the outset.

B. Proposed Amendments to 10 U.S.C. Section 2304.

1. 10 U.S.C. section 2304(a) is amended so that the phrase "maximum practicable competition" is substituted for the phrase "effective competition" in the two places that such phrase appears in that subsection.

(a) Explanation

Existing law as stated in DAR 1-300.1 and 3-101.(b) and GAO case law requires procuring agencies to obtain "maximum practicable competition." There is no reason to retreat from the present "maximum practicable competition" standard to the S. 338 "effective competition" standard in legislation aimed at increasing competition. Furthermore, this change in language, combined with defining competition as soliciting only more than one source is strikingly similar to the less stringent requirement of obtaining "reasonable competition" which is now limited to small purchases. Congress should make it clear that this less stringent requirement for competition is not being extended to higher dollar value contracts.

2. 10 U.S.C. section 2304(d)(2) should be amended to read as follows:

(2) Shall request competitive proposals when (a) sealed bids are not feasible and practicable under Clause (1) of this subsection, and, (b) if--

(i) it is determined that such action is necessary in the public interest during a national emergency declared by Congress or the President;

(ii) the public exigency will not permit the delay incident to advertising;

(iii) the aggregate amount involved is not more than $10,000;

(iv) the purchase or contract is for personal or professional services;

(v) the purchase or contract is for any service by a university, college, or other educational institution;

(vi) the purchase or contract is for property or services to be procured and used outside the United States and the Territories, Commonwealths, and possessions;

(vii) the purchase or contract is for medicine or medical supplies;

(viii) the purchase or contract is for property for authorized resale;

(ix) the purchase or contract is for perishable or nonperishable subsistence supplies;

(x) the purchase or contract is for property or services for which it is impracticable to obtain competition;

(xi) the purchase or contract is for property or services that is determined to be for experimental, developmental, or research work, or for making or furnishing property for experiment, test, development, or research;

(xii) the purchase or contract is for property or services whose procurement should not be publicly disclosed because of their character, ingredients, or components;

(xiii) the purchase or contract is for equipment that is determined to be technical equipment whose standardization and the interchangeability of whose parts are necessary in the public interest and whose procurement by negotiation is necessary to assure that standardization and interchangeability;

(xiv) the purchase or contract is for technical or special property that is determined to require a substantial initial investment or an extended period of preparation for manufacture, and for which it is determined that the sealed bid method would be likely to result in additional cost to the Government by reason of duplication of investment or would result in duplication of necessary preparation which would unduly delay the procurement of the property;

(xv) the purchase or contract is for property or services for which it is determined that the bid prices received utilizing the sealed bid method are unreasonable as to all or part of the requirements, or were not independently reached in open competition, and for which (A) each bidder has been notified of the intention to negotiate and given a reasonable opportunity to negotiate; (B) the negotiated price is lower than the lowest rejected bid of any bidder, as determined by the head of the agency; and (C) the negotiated price is the lowest negotiated price offered by any responsible supplier;

(xvi) it is determined that (A) it is in the interest of national defense to have a plant, mine, or other facility, or a producer, manufacturer, or other supplier, available for furnishing property or services in case of a national emergency; or (B) the interest of industrial mobilization in case of such an emergency, or the interest of national defense in maintaining active engineering, research, and development, would otherwise be subserved; or

(xvii) negotiation of the purchase or contract is otherwise authorized b· law.

a. Explanation

Under existing law, the use of the sealed bid method (formal advertising) is required unless it is not feasible and practicable and circumstances fall within one of the seventeen exceptions permitting negotiation set forth in 10 U.S.C. section 2304(a). S. 338 would weaken this preference for formal advertising by permitting the use of the competitive proposal method (negotiation) only when the contracting officer determines that advertising is not practicable. S. 338 is a major step forward in drawing a statutory distinction between competitive negotiation and noncompetitive negotiation--*i.e.*, sole source procurement. However, the preference for formal advertising should not be weakened since it provides less opportunity for contracting officials to disguise instances of preselection as "competitive" procurements. There is more potential for such abuses in competitive negotiation because the contracting officer can award to a preselected source based on subjective non-price factors. Furthermore, in negotiation, if a contracting officer is dissatisfied with the apparent successful offeror, he can give his preferred source a second chance by soliciting an additional round of best and final offers.

3. 10 U.S.C. section 2304(e)(4) and (e)(6) are deleted.

a. Explanation

10 U.S.C. section 2304(e)(4) would permit noncompetitive procurements for foreign military sales when requested by the purchasing government, and 10 U.S.C. section 2304(e)(6) would permit noncompetitive procurements where disclosure of the agency's needs to more than one source would compromise national security. These are new statutory grounds for noncompetitive procurements not contained in existing statutory framework that are added by S. 338 in its present form. Additional statutory grounds for noncompetitive pro-

curement are inappropriate in legislation aimed at increasing competition. Furthermore, in light of the abuses that resulted in the enactment of the Foreign Corrupt Practices Act, it would be a good idea to affirmatively state that foreign governments reimbursing an agency for the cost of a procurement cannot direct the use of noncompetitive procedures.

C. Proposed Amendments to 10 U.S.C. section 2305, Solicitation, Evaluation, and Award Procedures; Notice Requirements

1. Solicitation Requirements.

(a) Proposed Changes to S. 338

(1) Substitute the term "maximum practicable competition" for "effective competition" in 10 U.S.C. section 2305(a)(1)(A)(i), and "minimum needs of the using agency" for "such needs" in 10 U.S.C. section 2305 (a)(1)(A)(ii);

(2) Substitute "mimimum needs" for "nature of the needs" in 10 U.S.C. section 2305(a)(1)(B), and substitute "the maximum number of products" for "a variety of products" in 10 U.S.C. section 2305(a)(1)(B)(i).

(b) Explanation

The S. 338 language appears to relax the requirement that procuring agencies obtain "maximum practicable competition" and that any restrictive provisions in solicitations or specifications be justified by the minimum needs of the Government. The amendments to S. 338 would make it clear that Congress has no such intention.

2. Evaluation and Award Procedures.

(a) Proposed Change

(1) The following language is added at the end of 10 U.S.C. section 2305(b)(4)(A)(ii): "where it can be clearly demonstrated from the existence of adequate competition or accurate prior cost ex-

perience with the product that acceptance of an initial proposal without discussion would result in fair and reasonable prices."

(2) In 10 U.S.C. section 2305(b)(5) the language "or proposal" should be substituted for "received under sealed bid procedures."

(b) Explanation

Under existing law, award under negotiated method without discussion can only be made if a contracting officer has a basis for believing that the prices offered are fair and reasonable. It is much easier for a busy contracting officer to award without discussions. The proposed amendment to S. 338 would discourage contracting officers from doing so at the taxpayers expense by requiring them to demonstrate price reasonableness.

The proposed amendment to 10 U.S.C. section 2305(b)(5) would require Justice Department referrals for apparent anti-trust violations under the competitive proposal and noncompetitive as well as the sealed bid method. There is no reason for limiting this provision to the sealed bid method. In April 19, 1983, testimony before the House Armed Services Committee, Defense Logistics Agency officials testified that large aerospace manufacturers often used economic duress to discourage their subcontractors from bidding against them for spare parts contracts. Most of these contracts are awarded utilizing the competitive proposal or noncompetitive method and should be referred to the Justice Department as a possible anti-trust violation.

3. 10 U.S.C. section 2305(c) Notice Requirements

a. In both 10 U.S.C. section 2305(c)(1)(A)(i) and (ii) the word "proper" is entered before the word "notice." In addition, in 10 U.S.C. section 2305(c)(1)(A)(ii), the language "if such contract is awarded to other than a small business concern" is substituted for the language "if there is likely to be any subcontract under such contract."

In 10 U.S.C. section 2305(c)(1)(C) and subparagraph (c)(1)(C)(i), the term "proper" should be added before "notice."

In 10 U.S.C. section 2305(c)(2), the term "must" is substituted for the term "shall," and in 10 U.S.C. section 2305(c)(2)(A), the phrase "an accurate" is substituted for "a" at the beginning of the subsection. In 10 U.S.C. section 2305(c)(2)(D), the following language is added at the end: "and the name, address and telephone number of the agency official responsible for the sole source justification."

10 U.S.C. section 2305(c)(3)(B)(i) should be deleted.

b. Explanation.

The requirement of publishing a "proper notice" in the Commerce Business Daily, which includes "an accurate description of the property or services to be contracted for" is added to S. 338 to eliminate the practice whereby contracting officials steer a "competitive" procurement to their friends by publishing a misleading synopsis.

The proposed amendment would require synopsis of all contract awards over $10,000 rather than let DOD contracting officials determine "if there is likely to be any subcontract under such contract" as provided in S. 338. DOD officials have historically demonstrated a tendency for taking the easy way out whenever they can and should not be left with this much discretion. Furthermore, the $10,000 figure is consistent with the Public Law 95-507 subcontracting requirements which require small business subcontracting clauses in all contracts over that amount.

The proposed amendment to S. 338 also requires that synopsis of intended sole source procurements contain the name, address, and telephone number of the agency official responsible for the sole source justification. Agency officials often enter into sole source procurements as a result of a mistaken belief there is only one source. The purpose of this proposed amendment to S. 338 is to make it easy for sources to make themselves known.

The proposed amendment would delete provisions exempting sole source procurements made on the basis of urgency, industrial mobilization, international agreements or statute from Commerce Business Daily synopsis. There is no logical reason for such exception. The more information that the contracting community has about DOD procurements, the more competitive procurements there will be.

D. Proposed Amendments to 10 U.S.C. Section 2316 Provisions Re: Record Requirements

1. Proposed Amendment.

The language "other than small purchases" should be deleted from 10 U.S.C. section 2316(a).

2. Explanation

The amendment deletes an S. 338 provision exempting small purchases from its recordkeeping requirements. Public Law 95-507 reserves under $10,000 contracts for small business concerns where there are two or more potential small business bidders. However, DOD, in its High Dollar Spare Parts Breakout Regulation, has ignored the law and exempted such contracts from breakout to competitive procurement even where adequate data packages are available. As a result of this legally questionable DOD rule these small purchases are made on a noncompetitive basis to large original systems manufacturers at prices that are multiples of those that would be paid if these parts were competed. The only way to end this wasteful practice is public scrutiny which would be totally impossible if small purchases are exempted from recordkeeping requirements.

E. S. 338 Amendments to Federal Property and Administrative Services Act

In Title I, S. 338 makes similar amendments to the Federal Property and Administrative Services Act of 1949. These S. 338 provisions should be similarly amended.

II. Recommended Additional Sections to S. 338 Aimed at Eliminating Barriers to Competition

Despite Congressional interest in competitive procurements, a number of barriers to competitive procurements have appeared over the years. These are, among other things: (1) qualified bidders lists and qualified products lists, (2) inadequate public notice and opportunity to comment in DOD rulemaking efforts that perpetuate noncompetitive procurements, (3) the prohibitive cost to private individuals of challenging noncompetitive procurements in GAO bid protests and in the courts, and (4) DOD's lack of knowledge as to its rights in technical data needed for competitive procurements, faulty data packages purchased by the government and spurious claims of confidentiality made by prime contractors on major weapons systems. Attached are proposed additional sections to S. 338 aimed at curbing these barriers to competitive procurement and an explanation.

Enclosure

NEW GROUNDS FOR NONCOMPETITIVE PROCUREMENT IN S. 338

Senator COHEN. Tell me about the two areas you want to cut out.

Mr. SEIDMAN. Take a look at the chart appearing in the back of our testimony. It appears after the list of supporting small business associations. It is page 2 of the comparison of S. 338, H.R. 2545, and existing law.

The first five grounds for noncompetitive procurement are in existing law, S. 338 and H.R. 2545. These are:

First, technical needs of the agency;

Second, urgency;

Third, inadequate data or specifications;

Fourth, mobilization source; and

Fifth, a situation where sole-source procurement is authorized by statute.

CLASSIFIED PROCUREMENTS AS NEW GROUND FOR NONCOMPETITIVE PROCUREMENTS

Going beyond that are new statutory grounds for noncompetitive procurement. The first one is disclosure of the need to more than one source would jeopardize national security. We did some legal research on this ground, including a computer search on GAO. We found no case law supporting this use of such an exemption, which does not necessarily mean it has never been done.

Senator COHEN. Do you mean to say that when the Department of Defense contracts with a firm such as TRW or Hughes or any other firms to develop Stealth technology, that that is an item which is so restrictive and classified in nature that it ought not to be competed on the open market?

Mr. SEIDMAN. I am not saying that at all. I am comparing S. 338 to existing law and H.R. 2545. The key point is that this is not a statutory ground for noncompetitive procurement under existing law. Furthermore it appears to be duplicative of exemption 1 of S. 338 which is for property or services available from only one source.

Senator COHEN. No, it may not be only from one source. It may be that TRW would actually compete with another firm but that the military decides for one reason or another that it should only go to one source to minimize disclosure. Competition under these circumstances is not desirable because of the highly classified nature of the information.

Mr. SEIDMAN. But that need to minimize disclosure would be part of the minimum need of the Government and therefore only one source need be solicited. We have no major objection to this exception. It is just part of the showing that S. 338 adds new statutory grounds for noncompetitive procurements. It goes downhill very, very rapidly from here, especially in H.R. 2545.

NEW EXCEPTION FOR SOLE-SOURCE PROCUREMENTS AT DIRECTION OF FOREIGN BUYER

The next exemption would be for sole-source procurements made at the direction of a foreign government buyer. This exemption is directed at foreign military sales where DOD procures for a foreign government buyer. We had legislation enacted several years ago, the Foreign Corrupt Practices Act. Business overseas is not always conducted in the same manner that it is conducted here. It is likely that if we allow foreign government buyers to direct a sole-source procurement, that this will encourage such abuses——

Senator **Cohen**. What you are suggesting is that we amend the other laws to prohibit foreign governments from selecting any contractor under our system? Otherwise what we are trying to do is say where existing law permits a foreign government to select a contractor that this act is not designed to contravene that.

Are you suggesting we ought to change the underlying law which allows a foreign government to select a contractor?

Mr. **Seidman**. For one of two types of foreign military sales. One type of foreign military sale is the direct type, where a foreign country with a proper licensing agreement can contract with whomever they want, directly. The other method is to use DOD as a middleman.

If a foreign government elects to use DOD as a middleman, it should abide by our rules concerning competitive procurement. This would be prejudicial to small business concerns because large business concerns could assure themselves a lucrative sole-source contract by giving a "gratuity" to foreign officials.

The next exception, and it is not in your bill, is for technical or special property.

Senator **Cohen**. Stop for a moment.

What you are suggesting, I think pretty explicitly is, on most contracts for foreign military sales there is a kickback involved and many businesses who like to compete can't compete with the amount of money paid to a foreign government?

Mr. **Seidman**. I am not saying most often. I am just saying it happens, as documented by the record resulting in the enactment of the Foreign Corrupt Practices Act.

ADDITIONAL GROUNDS FOR NONCOMPETITIVE PROCUREMENT REQUESTED BY DOD

The next exception on our chart is just in H.R. 2545 and this is for technical or special property for which competition is likely to be more costly.

When Secretary Gilleece testified concerning the need for this new exception to S. 338, she spoke of the need for such exemption for purchases such as the F-14. We would like to note that, although this is not at present legal grounds for a noncompetitive procurement, there is such a provision in the high-dollar spare parts breakout regulations. It is presently used to justify the sole-source procurement of things such as nuts and bolts.

What happens is that you have a Government bureaucrat deciding whether or not it is cost effective to compete something. He is not in a position to make such a determination. More likely than not, he doesn't have the business background or experience.

GAO in its case law has repeatedly held that the determination of whether or not it is less costly to compete something should be made by what they call the "crucible of competition" and not by some bureaucrat sitting at a desk making a unilateral determination.[1]

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[1] *Olivetti Corp. of America*, B-187369, 77-1 CPD ¶146 (1977); *Burton Meyers Co.*, B-190728, 78-1 CPD ¶280 (1978).

So, we are very much against the additional exception which is in H.R. 2545 and requested by DOD.

Senator COHEN. What about the requirement that we compete in the construction of an aircraft carrier? Do you think we should mandate or have no exemption to allow DOD to say we are going to sole source an aircraft carrier, we are going to sole source a Trident submarine?

Mr. HAHN. Yes, competition would likely result in savings to the taxpayers. However, that is a different situation from spare parts when you are talking about a prime contract where there are qualitative factors involved where company A designs at one price or if company B does somewhat different. You have a legitimate qualitative factor involved.

Senator COHEN. You recognize there are circumstances under which competition may not be practical from a cost point of view, but for the sake of competition we ought not to put it out for bids to two yards for an aircraft carrier or Trident or possibly a B-1 or something of that magnitude?

Mr. HAHN. We recognize that, but such determination should be made by the "crucible of competition" and not some bureaucrat. Furthermore we do not see any reason for lack of competition when there are not subjective factors. If there is a blueprint for a part, for example, apply testing, apply quality control, make sure everything you buy meets the standard you set and reject anything that doesn't, no matter where it comes from.

There is no reason in the world why 95 to 99 percent of the spare parts DOD buys should not be put out for competition.

TRUTH IN NEGOTIATIONS ACT DOLLAR THRESHOLD

Senator COHEN. What would be the impact on small business if we lowered the threshold to $100,000 for the certification of the accuracy of cost of pricing data?

Mr. SEIDMAN. It would be an additional regulatory burden on small business. Compliance would be an additional cost for small businesses that lack sophisticated accounting systems while it would not be for large concerns which do. As I am sure you are aware, the Regulatory Flexibility Act suggests two-tiering regulatory requirements for large and small business.

What we would suggest in this case would be just to provide an exception from the Truth in Negotiations Act for small business concerns. This would go hand in hand with the exemption from cost accounting standards for small business concerns.

RECOMMENDED CHANGES TO S. 338

Senator QUAYLE. Specifically what would you like to see changed in this legislation?

Is your preference the exemption or is it the language in the competitive requirement or something else? Do you have an area that you think needs to be changed so that we can get more competition in the subcontracting business?

Mr. HAHN. Yes. Several areas have to be changed. I think the exemption is probably the biggest problem that I mentioned.

Senator **Quayle**. What exemptions?

Mr. **Seidman**. First would be the standard of competition. We don't want to see the standard of competition weakened from maximum practical competition to effective competition. We don't know exactly what those words mean, but effective competition seems to be less.

Senator **Quayle**. That is not an exemption here?

Mr. **Seidman**. No; we will get to the exemptions next.

Senator **Quayle**. Is this changing it to the maximum practicable basis rather than—what is the language?

Mr. **Seidman**. Effective competition.

Senator **Quayle**. That is the most important change you would like to see?

Mr. **Seidman**. It defines competition also as soliciting from more than one source.

Senator **Quayle**. It is a definition of competition requirement. You are more concerned about that than the exemption: is that correct?

Mr. **Seidman**. We are concerned with the exemptions also as well as weakening the statutory preference for formal advertising.

Senator **Quayle**. I realize that.

Mr. **Hahn**. It would be hard to put it one and two. With respect to the legislation as drafted now——

Senator **Quayle**. I am looking at the bill here. There are six exemptions. Which two do you have questions about?

Mr. **Seidman**. The exception we would like to see eliminated the most would be for sole source procurements made at the direction of a foreign government buyer.

We would also like to see the ones recommended by DOD not added because they will lead to future abuses.

Senator **Cohen**. H.R. 2545 is not our bill.

Senator **Quayle**. Let us look at S. 338 because I don't see that on here. How about S. 338? You can go talk to the House people about the House bill.

Mr. **Seidman**. We are most concerned about the exemption for sole source contracts made at the direction of the foreign buyer.

Senator **Quayle**. That is in the House bill, not in the Senate bill.

Senator **Cohen**. That is in our bill.

Senator **Quayle**. What number is that?

Senator **Cohen**. It is authorized by statute, exception No. 4.

Senator **Quayle**. You want that changed? That is the one that causes you the most problem?

Mr. **Seidman**. Not the first part concerning a treaty with the foreign government. That is another story, but the second part which would permit sole source procurement at the direction of a foreign government buyer.

Senator **Quayle**. The other one is the sixth one, "Disclosure of the agencies' needs to more than one source would compromise the national security."

Do you think that ought to be changed?

Mr. **Seidman**. We note it is a new statutory ground for noncompetitive procurement. That is would be a new statutory exemption permitting noncompetitive procurement not in existing law.

Senator QUAYLE. Your main concern is the definition of competition to the maximum practicable and plus the second part of No. 4, "or the directions of any foreign government reimbursing." Am I correct?

Mr. SEIDMAN. Yes; as well as weakening the statutory preference for formal advertising which requires award to the low bidder.

Senator COHEN. The problem I have with this is all we are trying to do is conform this law to existing statutes or treaties, that if in fact we have an arrangement with foreign countries under a NATO agreement, or whatever, that the foreign government will be allowed to select the contractor.

Then it seems to me we can't change that by this law. We have to change the underlying practices, the other laws which allow the foreign government to select the contractor.

Senator QUAYLE. Unless the second part of this is not applicable to the treaty and I think that is what they are saying. The first part is OK, a treaty you can't violate. I think they are saying the second part is outside.

We will have to look at it closer to see if that is the case.

BIDDER PREQUALIFICATION AS A BARRIER TO COMPETITION

I have a question from Senator Warner.

I note existence in DOD of bidder prequalification for spare parts contracts which has the effect of denying small business the opportunity to bid.

Can you briefly in 30 seconds or less describe the system for us?

Mr. HAHN. It is a system that is used to deny a small company access to its statutory right to a second opinion as to its capability to perform. If a company under statute is low bidder and they are told by DOD that they are not qualified for whatever reason, they have a right to go to SBA for a second opinion.

What DOD has done is to get this bidder prequalification system. If you are not on the bidder prequalification list, the bid will not be considered and DOD contends they have no right to a second opinion from SBA.

Senator QUAYLE. Is there something in this bill we can do about that?

Mr. HAHN. We think there should be because we are afraid, with all due respect to Mr. Cohen's good work, that this may be taken as a solution to all the anticompetitive practices that exist and it does not address that particular anticompetitive practice.

Senator COHEN. There is no such thing as a perfect bill.

Mr. HAHN. Of course not.

Senator QUAYLE. We can discuss further these two aspects they have brought up. Maybe Senator Warner will want to pursue this other thing.

Senator COHEN. I am sorry to rush you. We have to vote.

Thank you very much.

[Questions with answers supplied follow:]

QUESTIONS SUBMITTED BY SENATOR JOHN W. WARNER

Senator WARNER. On Tuesday, 7 June 1983, it was cited before the Senate Armed Services Committee on S. 338 that DCAA got a 132:1 return on audits of contractors above $500,000 and only 20 : 1 on contracts below $500,000. There was some confusion on this point at that time. Were these on preaward or post award audits? Would you further clarify these figures for the Committee?

Mr. Starrett. Both of the quoted net savings' ratios refer to preaward audits performed on contractor proposals. The 132 : 1 ratio pertains to all preaward audits performed on contractor proposals for DCAA Management Year (MY) 1982. This includes the proposals for amounts under $500,000. The 20 : 1 ratio pertains only to preaward audits of firm fixed price proposals under $500,000 for MY 1982. The following table comparing preaward and post award audits will further clarify these ratios:

MY 1982 net savings to the Government as a ratio to the DCAA cost to perform audits

Preaward:	
Under $500,000	21.7 to 1.
Over $500,000	331.7 to 1.
Post award:	
Under $500,000	Not normally cost effective to perform post award audit of contracts under $500,000.
Over $500,000	31.0 to 1.

Senator Warner. Recognizing the difficulties inherent in "solicited unsolicited contracts" and alternatively, the concerns that universities have in losing opportunities to further innovative research, do you see a way to address both legitimate problems?

Mr. Cibinic. First, there should not be any change in S. 338 to make any special reference to unsolicited proposals whether by universities or other firms. The ability of the government to protect proprietary data would give sufficient assurance to a university researcher that any proprietary data submitted to the government in connection with an unsolicited proposal could be used only to enter into a contract with the submitter. Thus a university researcher who developed proprietary data would be in a position to receive a sole source contract under S. 338. This protection should provide sufficient motivation to continue.

Senator Cohen. The committee will stand adjourned.

[Whereupon, at 4:55 p.m., the committee adjourned, subject to the call of the Chair.]

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